

Submission to:

**The New Brunswick, Right to Information and Protection of
Personal Information Review Task Force**

Submitted by:

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Dated: 15 June 2007

Introduction:

This submission is tendered to the Right to Information and Protection of Personal Information Task Force to assist with the review of New Brunswick's *Right to Information and Protection of Personal Information* statutes. Part A of the submission offers general principles related to personal privacy and public information access. Where appropriate, emphasis has been placed upon the New Brunswick context. Part B addresses many of the policy questions posed within the consultation document entitled, *Access to Information and Privacy Review: A Discussion Paper*¹ that was circulated by the Province to bring focus to the public consultations on privacy and access reform.

Part A:

Striking the right balance...

Personal privacy and government transparency are fundamental aspects of a free and democratic society. The challenge is twofold for privacy and access policies. First, there is a need to cast the right balance between legislative presumptions for the release of the various types of information held or controlled by democratic governments that may legitimately be cast as 'public' in nature. On the other hand, the policies must safeguard the information about individuals that may legitimately be regarded as 'private' in nature that is held by custodians in either the public or private sector.

Control over one's own personal information...

The right "not to be compelled to share our confidences with others"² is closely connected with personal autonomy and such autonomy is the foundation of all other freedoms. It is accepted that governments, too, have legitimate confidences. The most essential aspect of individual privacy is the right to control the use, access, release or retention of one's own personal information by others. Over the past several decades, advances in technology have introduced progressively more sophisticated means by which public and private entities can readily collect,

¹ New Brunswick, Right to Information and Protection of Personal Privacy Review Task Force, *Access to Information and Privacy Review: A Discussion Paper*, (Province of New Brunswick, 2007).

² *R. v. Duarte*, [1995] 1 S.C.R. 30, at para. 53-54.

organize, match, analyze, retain and disseminate personal information. Those same technological advances have facilitated the exploitation of our personal data for financial gain, such as through various forms of identity related fraud (commonly referred to in the media as identify theft). In other cases, failure to properly safeguard personal information has lead to public embarrassment. It is submitted that the custodians of our personal information, whether operating in the public or private sector, should be held responsible and accountable to safeguard our information by means of a trusteeship type of relationship that is framed in legislation.

Democratic rule ain't for wimps...

Democratic governance is a messy thing. Those who govern must be prepared to provide to our citizens much of the information upon which public policy decisions will be made, openly discuss the policy options available, and explain why any particular option should be chosen. When things go wrong, public accountability means that those who govern must explain how and why errors or miscalculations were made. Challenge and criticism by the public and media cannot be avoided. The denial of access to public sector information does not quell public criticism, it only serves to add a cranky and cynical edge to it.

Government secrecy can undermine the functioning of a free society. It has been said that bad government requires secrecy, but if given the choice, all government will naturally tend toward greater secrecy than necessary³. In order to participate effectively in civil society, people need access to information about the inner workings of their government, and this access should be broadly granted and treated as a presumptive right. In a democracy, the people are partners with government in charting the course of their society. Far from being the private property of the government as it is so often treated, publicly collected information belongs to the people and should be released on demand unless the government can produce compelling reasons why it should not. In a free society, the government has an obligation to disclose information, even when it is inconvenient or embarrassing to do so.

The right prescription for New Brunswick...

It is critically important to New Brunswick that we adopt a modern, unified and comprehensive legislative foundation to safeguard our personal privacy and to secure public access to government information. The principal reason is that the existing legislative framework and resourcing models for public information access and personal privacy in New Brunswick are not working well.

Our *Right to Information Act* (RTIA) and *Protection of Personal Information Act* (POPIA) are clearly out of step with other Canadian jurisdictions. While laudable when introduced in 1978, our information access legislation has been interpreted over the years in such a manner as to inhibit access to public information that might otherwise be available. Additionally, New Brunswick's privacy legislation, although proclaimed as recently as 2001, suffers problems of legislative scope and definition. First, our POPIA applies only to the public sector. As will be explained in Part B of this submission, this is problematic because the federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) does not effectively cover private sector employees who work under provincial constitutional jurisdiction. Second, our

³ Article XIX: Global Campaign for Free Expression, "The Public's Right to Know: Principles on Freedom of Information Legislation", online: <<http://www.article19.org/pdfs/standards/righttoknow.pdf>>, 1999 at 1.

current definition of private information (“information about an identifiable individual”) is so encompassing that it inhibits the operation of our access to information legislation. This definition has been judicially interpreted to include even the basic contact information, such as a person’s name and e-mail ID. Thus, when individual contact information (even the contact-type information for provincial civil servants) is contained within information that is inherently public in nature, the identifying information must be severed or the access request may be legitimately denied. Another factor inhibiting the functioning of both our privacy and access statutes is that we have failed from the outset of each statutory regime to provide the appropriate training, staffing and other resources that were necessary.

On the access side, our province has scored badly in both of the ‘information access audits’ performed by the Canadian Newspaper Association (CNA). In 2005 and 2006, the CNA conducted National Freedom of Information Audits, which measured government responsiveness to official requests for “basic, uncontroversial information.”⁴ In 2005, New Brunswick ranked the second lowest of all the provinces, failing to disclose information pursuant to three-quarters of these requests.⁵ In the 2006 Audit, New Brunswick’s accessibility improved slightly in sheer terms, with a response rate of 33 percent. However, this did not keep pace with improvements in other jurisdictions, which may have been influenced by negative publicity from the first Audit. New Brunswick replaced PEI in 2006 as the lowest-ranked among all provinces for information accessibility.⁶

For New Brunswickers, personal privacy and public information access problems are particularly acute because we lack the privacy and access champions or advocates that often exist in other provinces. For example, our provincial Ombudsman performs important privacy and access functions, but our funding for this office is poorest in the country. Also, our province does not provide government funding for civil legal aid representation. The budget available to opposition parties in New Brunswick for research purposes is very low. We submit that due to high concentrations of corporate ownership and media cross-ownership, the level of investigative journalism in our province is quite modest. Additionally, at present, New Brunswick does not impose explicit privacy and security obligations on the custodians of our individual health information through dedicated personal health information (PHI) legislation. Unlike some other provinces (British Columbia, Saskatchewan, Manitoba and Newfoundland and Labrador), New Brunswick has not created a statutory tort of ‘invasion of privacy’ to facilitate redress by private law suit when individual privacy rights are invaded. For all of these reasons, our province is in particular need of modern and comprehensive personal privacy and public access legislation.

According to the CNA, the key weakness in New Brunswick’s information access laws is that they do not compel authorities to disclose information, and do not cover municipal governments, local police, or hospital administrations.⁷

⁴ “Canada’s Right to Know on Shaky Ground: Newspaper Group 2nd National Freedom of Information Audit Reveals Major Barriers Remain”, online: Canadian Newspaper Association <www.cna-acj.ca>. In the 2006 Audit, requests were for community crime statistics, municipal herbicide/pesticide use, and hospital staff bonuses. The 2005 Audit covered a more diverse selection of requests, including restaurant inspection information, education statistics, road repairs, public servant work schedules and drinking water testing.

⁵ Canadian Newspaper Association, “A Report on a National Freedom of Information Audit”, 2005 at 15.

⁶ Canadian Newspaper Association, “National Freedom of Information Audit”, 2006 at 9.

⁷ *Ibid.* at 1-2.

Though the current *Right to Information Act* states that⁸ “an appropriate Minister may *only* deny a request for information” under enumerated and theoretically fairly specific circumstances, the CNA Audits provide strong evidence that the practical situation is far different. It is submitted that non-compliance typically takes three forms: reliance upon broad interpretation of exemptions, the treatment of discretionary exemptions as mandatory, and the use of stalling tactics.⁹ While New Brunswick’s *Right to Information Act* requires that a minister respond to an information request within thirty days, and provide written reasons for a denied request; it seems that government entities often disregard these rules, content to gamble on the unlikelihood that the applicant will attempt to enforce their rights through an appeal. Appeals are often lengthy and expensive processes without effective sanction for the recalcitrant government entity.

It’s a matter of trust...

When governments do not handle public and private information in an appropriate manner, it leads to a cranky and cynical populace. It is instructive that in its May 2007 report, New Brunswick’s *Self-Sufficiency Task Force* identified public distrust of government as a serious and ingrained problem.¹⁰ Our citizens appear to believe that their government uses power and control over public information in self-serving ways. Such public cynicism must be addressed if the province is to succeed in its struggle for economic revival in the near future.

The Graham government has identified the need to dispel this atmosphere of distrust. The Provincial Liberal Party’s campaign platform entitled, *Charter for Change*, promised a new emphasis on openness and government accountability. In a recent press release, Premier Shawn Graham stated,¹¹

“We committed in our *Charter for Change* to bring an unprecedented level of financial openness and public accountability to the workings of government.”

In addition to a promise to modernize New Brunswick’s privacy and right to information laws, the *Charter* document commits the new government to introduce legislation that would encourage government employees to report wrongdoing and protect those who do so.¹² It is submitted that the new government also must commit itself to a radical attitudinal adjustment if it is to transition to a ‘culture of openness,’ where public access to government information is viewed as a right rather than a privilege. Recent research on trust phenomena teaches us that trust is very difficult to regain once it has been lost.

⁸ *Right to Information Act*, S.N.B. 1978, c. R-10.3, s. 5(1). Emphasis added.

⁹ Such tactics were discussed generally by Alasdair Roberts in *Limited Access: Assessing the Health of Canada’s Freedom of Information Laws*, online: Queen’s University School of Policy Studies, April 1998, <<http://qsilver.queensu.ca/~roberta/>>.

¹⁰ New Brunswick, Self-Sufficiency Task Force, *The Road To Self-Sufficiency, A Common Cause*, at 15.

¹¹ News Release, “Right to Information, Protection of Personal Information Acts to be reviewed,” Office of the Premier, Communications New Brunswick, 13 February 2007.

¹² So-called ‘whistleblower legislation’ for the public sector.

Part B:

Within the consultation document, *Access to Information and Privacy Review: A Discussion Paper*,¹³ a number of policy questions have been posed. This part of the submission will address many, but not all of those policy questions. Generally, the questions are addressed in the same order as they appear with the discussion paper.

1. Context: Determining rights and limits to public access

It is readily acknowledged that our provincial government plays many roles. For example, our government must act in the public interest when it performs the functions of an administrator, regulator, contractor, public security manager and lawmaker. As conceded in Part A of this submission, governments have legitimate confidences too. We submit that a blended access and privacy statute should define the informational access rights of our citizens in expansive terms and that all exceptions (access denial powers) should be explicitly set out. Task Force members are invited to examine the access and exception provisions created by British Columbia, Alberta and Newfoundland and Labrador for reference purposes.

It would be appropriate to include within a new legislative regime for access and privacy, provisions similar to those in Ontario that give to the head of a government department the authority to deny an information request if, upon reasonable grounds, it was regarded as “frivolous or vexatious.”¹⁴ Our proviso is that the total number of all such denials should be reported annually to the Legislative Assembly.

The Discussion Paper (at page 5) references the concerns often voiced by politicians and senior civil servants that the codification of the public’s right to access government-held information inhibits the candour and frequency of the frank discussions that should occur within the internal fora where government decision making takes place and that, ultimately, it politicises the civil service. We submit that the politicisation of the civil service is a phenomena of modern democratic governance and that properly functioning access legislation makes only a modest contribution to it. We wish to remind the Task Force members that our governing political party has made a commitment to enact whistleblower legislation for the public sector. Clearly, this will have important ramifications for the political status of provincial civil servants. Lastly, we wish to offer the observation that political and ministerial accountability are not what they used to be under the Westminster-Whitehall model of government. Governments and ministers do not fall as readily as they used to when misfeasance or malfeasance beneath them is revealed.

2. Scope of the *Right to Information Act*

At present, the RTIA is under-inclusive because the public entities subject to the Act must be explicitly listed. As noted in Part A of this submission, one of the reasons that New Brunswick consistently lags behind other jurisdictions in terms of access statistics is that the relevant legislation does not cover municipalities, universities, local police, or hospital administrations.¹⁵ The scope of this or any replacement legislation must be expanded to include these public

¹³ *Supra* note 1. The policy questions commence at page 9 of the Discussion Paper.

¹⁴ *Freedom of Information and Protection of Privacy Act* R.S.O. 1990 c. F.31 ss. 10(b) and 27.1(1) and Regulation 460 s.5.1, R.R.O. 1990. The criteria for the determination of “frivolous or vexatious” requests that are set out within this Regulation are worthy of serious consideration for New Brunswick.

¹⁵ *Supra*, note 6 at 1-2.

bodies. In particular, we submit that our privacy legislation should cover municipal governments in the Province.

While most other provinces include municipalities in their definition of public bodies covered by their access to information legislation, as in the case of Alberta, Ontario extends information access obligations to its municipalities through dedicated legislation (separate legislation for municipalities is not recommended). We submit also that the salutary democratic reasons for including policing bodies, universities and hospital administrations within access schemes are more compelling than the justifications for excluding them. The inclusion of police, universities and hospital administrations within access legislation is common in other Canadian jurisdictions.¹⁶ In order to bring our province in line with developments in privacy and access elsewhere in the country, New Brunswick should include these bodies under the ambit of a reformed access and privacy schema.

3. Access Process

4. Review Process

Under the present legislation in New Brunswick, an applicant who is denied access to government information has only two options: appeal to the provincial Court of Queen's Bench, or appeal to the Ombudsman.¹⁷ At the first stage, these are mutually exclusive options.¹⁸ Taking the Ombudsman route, while advantageous in that his services are free of charge, has a number of shortcomings.

Despite handling the widest portfolio of any such office in the nation, New Brunswick's Ombudsman's office ranks as one of the most poorly funded. This is particularly true with regard to its information and privacy function, on which New Brunswick spends \$0.14 *per capita*. This is least among all the provinces, and is far behind the likes of Manitoba, at \$0.88, Ontario, at \$0.93, and Alberta, which spends \$1.36 *per capita*.¹⁹ New Brunswick is second-last to PEI in raw expenditure on its Information and Privacy Office. This severely limits the attention that the Ombudsman's office can give to access or privacy cases, and certain types of complaints, such as employer-employee privacy disputes, are too complex for that office to handle at all due to scarcity of current resources.

Part of the problem is the wide portfolio assigned to this office: in addition to the usual functions of an Ombudsman, the New Brunswick office also operates as Youth Advocate and *de facto*

¹⁶ Manitoba: *Freedom of Information and Protection of Privacy Act* C.C.S.M. c. F175 s. 101(2), covers local government, health care bodies (including hospitals) and educational bodies (including universities). Ontario: *Freedom of Information and Protection of Privacy Act* R.S.O. 1990, Chapter F.31 s. 14(5), outlines accessibility to law enforcement statistics, though many exceptions to access remain under the possibility it will "interfere" with law enforcement. British Columbia: *Freedom of Information and Protection of Privacy Act* R.S.B.C. 1996 Chapter 165, s.15(3) provides a wider set of mandatory police disclosure criteria; Schedule 1, includes universities, local government and social services bodies under its definition of public bodies.

¹⁷ *Supra* note 8, s. 7(1).

¹⁸ *Ibid*, s. 7(2). If the Ombudsman recommends release of information from a minister and that minister refuses, the original applicant can appeal to the Court of Queen's Bench seeking a court order.

¹⁹ New Brunswick, Office of the Ombudsman, *Annual Report 2005/2006* (Province of New Brunswick, 2006). All figures estimates for 2006/2007.

Information and Privacy Commissioner. Most provinces, by contrast, have a separate office dealing specifically with information and privacy. Either the province should dramatically increase access and privacy funding to the Ombudsman's office, or it should consider creating a separate office dealing only with privacy and access issues, as other jurisdictions have.

The Ombudsman does not have the power to deliver an order compelling, for example, the disclosure of information. The Ombudsman may only make a recommendation to the appropriate minister, which that minister may or may not decide to follow.²⁰ In Ontario, the Privacy Commissioner does have the power to make legally binding orders, which can only be obtained currently in New Brunswick by exercising the costly option of appeal to the Court of Queen's Bench.²¹ By expanding the power of the Ombudsman (or the proposed separate provincial Privacy Commissioner) to allow the issue of binding orders, New Brunswick's public access to government could be significantly expanded, especially for the wide segment of the population lacking the resources necessary to challenge the government in court. This would also streamline the procedure by making a level of appeal unnecessary, and avoid potential expenditure of court resources on a matter already decided by a competent official. This reform would open the government to greater risk of compelled disclosure, but would enhance its public credibility through such a display of openness and good faith.

Increased funding must be allocated to the Ombudsman or Privacy Commissioner's office itself, but it is also required for privacy and access education efforts. Education must occur at two levels: within government departments, and toward the public at large. Offices must be established within each significantly-sized public body to handle access and privacy issues, and one of the functions of such an office would be to educate staff about their obligations under the letter and spirit of new legislation. This would help introduce a more open culture within government agencies. On the public level, there must be education, delivered through advertising campaigns as well as more unconventional methods such as public workshops, to inform the people of their privacy and access rights, and what to do if they encounter difficulties accessing government information or are concerned about threats to their private information. An informed populace is of course vital for a functioning democracy, and making the public aware of improvements in the realm of government-held information would go far toward dispelling the popular cynicism toward this issue.

Ontario's *Freedom of Information and Protection of Personal Privacy Act* and equivalent municipal legislation both provide for the Privacy Commissioner to authorize mediation as an alternative to formal adjudication in the event of an access to information appeal. According to the Ontario Privacy Commissioner's 2001 report, a mediation option is highly advantageous to include in privacy and access legislation. The report cites a 70-75% success rate in fully resolving mediated appeals, which saves the time and cost associated with court.²² Mediation is also endorsed for its ability to put a human face on government - by agreeing to meet and negotiate with an aggrieved party, public institutions can show that they take the public's

²⁰ *Supra* note 8, s. 10(3).

²¹ *Ibid*, ss. 8(1), 10(1)-(2).

²² Ontario, Office of the Privacy Commissioner, *It's Your Information: Information and Privacy Commissioner / Ontario Annual Report 2001* at 6.

concerns about information access seriously.²³ The inclusion of a mediation option, at the Ombudsman/Privacy Commissioner's discretion, should be considered for inclusion in New Brunswick's privacy and access legislation.

5. Administration

Other jurisdictions have made strides in streamlining the access-to-information process and making it more user-friendly. At the same time, these changes help to encourage official openness and prevent officials from derailing requests on technicalities. In Newfoundland's *Access to Information and Protection of Privacy Act* (ATIPPA), there is provision for automatic transferal of requests if a different public body than the one applied to holds the information.²⁴ Under New Brunswick's present legislation, an applicant would have to file a new request in such a situation.²⁵

One of the less logical aspects of our present legislation is its lack of provision for extensions beyond the typical thirty days' time limit for an official response. While New Brunswick's RTIA stipulates that a request for information must be accepted or denied within thirty days, if there is no response after that period the applicant's only recourse is an appeal to the Ombudsman or Court of Queen's Bench.²⁶ Newfoundland allows the government to apply for additional time in the event the applicant does not give enough detail, requests a large volume of documents, or if notice to a third party is required.²⁷ At a minimum, these improvements must be added to New Brunswick's legislative scheme to increase accessibility of government information to the public.

Changes in the spirit of the legislation are also important to creating an environment of openness in government. As such, New Brunswick's legislation should express progressive, public-minded goals within its text. Newfoundland's legislation states such an overarching purpose upfront: "to make public bodies more accountable to the public and to protect personal privacy."²⁸ It speaks of "giving the public a right of access to records", "limited exceptions" to that right, prevention of unauthorized data collection, and independent review of privacy and access decisions.²⁹ As with British Columbia's *Freedom of Information and Protection of Personal Privacy Act*, Newfoundland's ATIPPA makes a point of imposing an express duty that the heads of public bodies are to make every reasonable effort to assist applicants and avoid delays.³⁰ Far from being hollow rhetoric, text like this can also assist when courts attempt to interpret ambiguities and adjudicate disputes involving the legislation.

All provincial authorities and bodies under the purview of privacy and access legislation should be compelled to keep detailed statistics about information and privacy requests, which would be published in annual reports. This move would help to keep agencies honest by encouraging self-policing, and minimize the use of tactics such as stalling or needlessly transferring requests to

²³ *Ibid.*

²⁴ *Access to Information and Protection of Privacy Act*, S.N. 2002 c. A-1.1, s. 17.

²⁵ *Supra* note 8, s. 3(4).

²⁶ *Ibid.* ss. 3(1), 7(1).

²⁷ *Supra* note 24, s. 16(1).

²⁸ *Supra* note 24, s. 3(1).

²⁹ *Ibid.* ss. 3(1)(a)-(e).

³⁰ B.C. FIPPA: *Supra* note 16, s. 6(1); N.L. ATIPPA: *Ibid.* s. 9.

other agencies, as these would be visible in the statistics. It would also shift some of the resource strain from the Ombudsman/Privacy Commissioner's office in the collection of such data, shifting it into the hands of those who can most easily collect it. There would still need to be some level of oversight to ensure against manipulation of the data at its source, however.

One of the key weaknesses in New Brunswick's current model of enforcing privacy and access abuses is that it is entirely complaint-based, relying on the individual to come forward to the Ombudsman or courts after an alleged violation has taken place. In some other provinces, particularly in the field of personal health information, a more pro-active approach is taken. Under an auditing and reporting model, the appropriate agency not only takes complaints from individuals, but also actively examines the agencies under its purview for problematic incidents and trends. In Ontario, for example, the Privacy Commissioner is empowered to audit public service providers to ensure private information is being properly safeguarded.³¹ New Brunswick should seriously consider the possibility of introducing such a scheme and generalizing it to include all government-held information. Additionally, we should create an active obligation on the provincial civil service to assist the requester with their petition.

While there are procedures in place to sanction government agencies for negligent privacy breaches, there is no corresponding enforcement mechanism to prevent such lapses in security by private sector businesses, which also compile vast quantities of personal data. New Brunswick's privacy legislation should be drafted with the consideration in mind to be applicable in future to private entities as well, with appropriate penalties for enforcement. Legislators should also consider the introduction of a new statutory tort of negligent failure to safeguard information by an information custodian. This would echo the recent acknowledgement of a common-law tort addressing invasion of privacy.³²

6. Privacy

7. Limitations on Access:

New Brunswick is the only province or territory with separate statutes for protection of personal information and access to government information, and the rectification of this oversight must be the starting point for reform of these laws in the province. Privacy and access are intrinsically linked, and must be balanced carefully. A single document can best accomplish this due to internal consistency and lessened potential for confusion and statutory conflicts, and would more easily maintain this consistency when future amendments are introduced.

As an example, a combined piece of legislation can examine access petitions in a more contextual way in situations where an application may conflict with a third party's right to privacy. Compare s. 6(b) of the New Brunswick *Right to Information Act* which automatically denies or severs information where it would disclose personal information of another party, to s. 28 of Newfoundland's ATIPPA, which provides clear guidelines for the disclosing agency to obtain permission to release the requested information. This strikes a better balance between

³¹ *Supra* note 14, s. 65.1(8).

³² As discussed in: Arnold Ceballos, "Private Investigator Restricted by Privacy Right", *The Lawyers Weekly*, Jan 26, 2007, at 14.

privacy and access rights than would be possible in New Brunswick under the present legislative scheme.

One of the most important differences between New Brunswick's RTIA and more contemporary legislation such as Newfoundland's ATIPPA is the level of detail in their access limitations. One must assume that government, given its natural inclination toward secrecy, will interpret a statute broadly where it mandates or allows the denial of information. Therefore it is imperative that such limitations to access are as narrow and specific as possible. Just as importantly, it must be clearly spelled out when a limitation is mandatory or discretionary, and the circumstances where a limitation does not apply. An illustrative example can be found in how the above two pieces of legislation deal with disclosure of policy advice.

In New Brunswick's RTIA, "there is no right to information under this Act where its release [...] would disclose opinions or recommendations for a Minister or the Executive Council [or] would disclose the substance of proposed legislation or regulations."³³ Newfoundland's legislation similarly limits access to these types of information, but they are instead discretionary limitations, and include a long list of exceptions, where "the head of a public body shall not refuse to disclose" information.³⁴ These exceptions include such vital information as polls, surveys, environmental impact statements, and departmental performance evaluations.³⁵ Another comparison between the two statutory schemes where specificity makes a clear difference is how each deals with disclosures of law enforcement information. The RTIA closes the door to all information gathered by local police or the RCMP in the course of investigating illegal or suspected illegal activity, or which would impede any investigation.³⁶

In Newfoundland, however, these matters fall under "disclosure harmful to law enforcement", which is a carefully defined discretionary limitation with emphasis placed on 'reasonable expectation' that the disclosure would actually harm police interests.³⁷ Furthermore, there are several key exceptions spelled out in that section, where the law enforcement limitation may not be used to exclude information such as routine reports and statistical analyses on the effectiveness of law enforcement programs.³⁸

It is apparent that other jurisdictions such as Newfoundland have identified the need to combat overly broad interpretations of limitations on access by clearly defining the circumstances when information may and may not be excluded from public view. New Brunswick must embrace similar reforms to bring its laws to the national standard.

8. Protection of Personal Information

There is at present a gaping hole in meaningful privacy protection in private-sector employer/employee regulations in New Brunswick. Over half of privacy complaints to the New Brunswick Ombudsman's office originate from employees' concerns with their employers

³³ *Supra* note 8, ss. 6, 6(g)-(h).

³⁴ *Supra* note 24, s. 20(1).

³⁵ *Ibid.* ss. 20(2)(b)-(c), (e)-(f).

³⁶ *Supra* note 8, s. 6(h1), (h2).

³⁷ *Supra* note 24, s. 22(1).

³⁸ *Ibid.* s. 22(3).

activities. Under the present legislative scheme, there is often no remedy available in these cases.³⁹ The provincial POPIA only applies to public entities subject to the *Right to Information Act*, and not to private businesses. The federal PIPEDA is of little help to those seeking a remedy against their private-sector employer, unless that employer is a federally-regulated entity, such as an airport. PIPEDA is on uncertain constitutional grounds and is presently subject to a constitutional challenge in Quebec, alleging that it interferes with provincial authority over property and civil rights.⁴⁰

While the federal Privacy Commissioner has been willing to invoke the federal ‘trade and commerce’ power to apply PIPEDA to private sector dealings with citizens, he is unwilling to risk further conflict challenges by using it to regulate labour relations. Since the federal government is unwilling to offer assistance, provincial law is non-existent on the matter, and the Ombudsman’s office lacks the resources and authority to take on these types of cases. Employees with privacy concerns working within provincial jurisdiction have no choice but to either drop the matter or hire a lawyer on their own. This is often prohibitively expensive, and present law tends to favor employers, so the outcome is uncertain even if the case has serious merit.

Other Issues:

Whistleblower Protection

Encouraging public employees to report official wrongdoing is key to breaking the culture of secrecy within government agencies. To this effect, New Brunswick should enact legislation that protects those who complain of mismanagement, criminal activity, or other malfeasance within the public sector. A good model exists in Manitoba’s *Public Interest Disclosure (Whistleblower Protection) Act*. This legislation provides that a reporting process be put in place for each department and public body, to maintain the disclosing party’s confidentiality to the greatest extent possible.⁴¹ Its key component however is the specific protection it offers whistleblowers against reprisals, should their identity become known. Anyone found to have taken a reprisal against an employee is subject to a maximum fine of \$10,000, whereas without this legislation, reprisals had to be dealt with under union collective bargaining agreements. The Ombudsman of Manitoba is charged with this statute’s enforcement, and can hear complaints directly and refer them to the provincial Auditor General.

In the event of emergencies, Manitoba’s whistleblower legislation provides protection to employees who disclose information directly to the public, so long as an initial attempt was made to approach authorities. This does not quite meet the recommendation made by the public-interest group ‘Article XIX’ for whistleblower protection legislation that operates no matter how the information is released.⁴² However, not all circumstances warrant a direct appeal to the media however, so care must be taken to encourage informers to use proper channels, especially where there is potential for a privacy breach involving third parties.

³⁹ Interview with Christian Whalen, Legal Counsel for NB Ombudsman’s Office, Friday, June 8, 2007.

⁴⁰ Nikki Swartz, “Canada’s Privacy Law Faces Legal Challenge”, *Information Management Journal*, online: <http://findarticles.com/p/articles/mi_qa3937/is_200403/ai_n9358220> Mar/Apr 2004.

⁴¹ *Public Interest Disclosure (Whistleblower Protection) Act*, S.M. 2006 c. 35, ss. 5(1)-(2).

⁴² *Supra* note 3 at 10.

The introduction of whistleblower protection legislation would send a strong message to the public that the government of New Brunswick is committed to accountability and an honest, efficient public sector. As such, this sort of legislation should be implemented, and can be included in a comprehensive access and privacy “code” that has been proposed to replace the present package of relevant Acts. British Columbia has included a very succinct and serviceable whistleblower protection clause directly within its *Freedom of Information and Protection of Privacy Act*.⁴³ Therefore it would be neither unprecedented nor impractical to consider the inclusion of such protection into New Brunswick’s privacy and access legislation.

Conclusion:

We hope that the recommendations arising from the deliberations of the *Right to Information and Protection of Personal Information Review Task Force* will lead to significant changes to how government institutions handle and think about public information. Legislative reform must actively address the culture of secrecy in government, clearly stating this as a purpose, while emphasizing innovative techniques and proper funding to affect a dramatically more open information culture within the Province of New Brunswick. We hope also that the Task Force members find this submission of assistance to them.

⁴³ B.C. FIPPA: *Supra* note 16, s. 30.3.