

Submission to:

**The Right to Information
and Protection of Personal Information
Task Force**

By

The New Brunswick Legislative Press Gallery

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Introduction: The Case for Openness

The New Brunswick Press Gallery has existed since Dec. 1, 1961, working on the legislature grounds. It has had the honour of calling some of the province's most influential journalists its members. Reporters such as Eldred Savoie of Radio-Canada, Angus MacDonald of the Moncton Times & Transcript and Emery LeBlanc of L'Evangeline, who was our first president, served their readers well using different mediums and languages to report on the actions of the day's government. The day the press gallery opened, then-premier Louis J. Robichaud spoke to the importance of the press:

When one considers that it is mainly through the efforts of the press that our citizens are kept informed of the activities of our legislature, one can readily appreciate the importance of their labour. I am sure that the formation of this organization cannot help but add to the efficiency of their important function here in this house.

How reporters collect information has changed since the days when reporters like MacDonald covered the legislature, where information would be exchanged over a drink at the River Room on Queen Street. Those relationships have changed and now the media is far more reliant on the Right to Information Act (RTIA) to gather information and pass it on to readers and audiences.

The province's legislative press gallery welcomes the Right to Information and Protection of Personal Information Review Task Force. It comes at a time when independent parties are joining the media in its long-held belief that the existing legislation is outdated, inadequate and serves the public poorly.

The press gallery's stance is straightforward. The province of New Brunswick can become a world leader in how governments proactively disclose information to the citizenry by unshackling the restrictions that have kept documents under lock and key for generations. Many of history's most notable scholars and theorists have weighed in on the side of opening up governments as the only true way to promote a viable and healthy democracy. John Stuart Mill, a former British Member of Parliament, argued passionately in *On Liberty* that social progress can be blocked by silencing opinions. Ombudsman Bernard Richard has routinely quoted Mill's view on open democracy in his own recommendations for government disclosure.

In the case of any person whose judgment is really deserving of confidence, how has it become so? Because he has kept his mind open to criticism of his opinions and conduct. Because it has been his practice to listen to all that could be said against him; to profit by as much of it as was just, and to expound to himself, and upon occasion to others, the fallacy of what was fallacious. Because he has felt that the only way in which a human being can make some approach to knowing the whole of a subject is by hearing what can be said about it by persons of every variety of opinion, and studying all modes in which it can be looked at by every character of mind. No wise man ever acquired his wisdom in any mode but this; nor is it in the nature of human intellect to become wise in any other manner.

Response to the Discussion Paper (1): Red Herrings

The press gallery appreciates Dr. Donald Savoie's thought-provoking discussion document, but the Context section contains several red herrings that we hope will not shape the government's thinking or lead to dangerous amendments to the act.

There is a false distinction created with the statement that "opposition parties, the media, lawyers and lobbyists have made much more use of the legislation than citizens." An individual journalist *is* a citizen and has as much right to the information as anyone else; her or his rights as a citizen are not diminished or compromised because she or he is a reporter. On the contrary, the reporter is acting on behalf of the citizenry. Government ministers may not like what the reporter does with the information, but it would be a dangerous step if RTI requests from journalists were taken less seriously than those from "real" citizens.

The public's right to information is just that: a right. What opposition politicians, journalists and others do with that information is not a criterion for determining access. There can be no sliding scale on this issue. There is no suggestion that the judicial system be restricted or limited when a single judge makes a mistake; nor should a particular politician's real or imagined worst-case RTI

scenario be used to justify limits on access.

The discussion document raises a very real concern about the emerging culture of secrecy, where civil servants refuse to put pertinent information on paper to shield themselves or their minister from future embarrassment. The press gallery's list of recommendations will offer realistic solutions to that worrisome trend. Our determination to find a resolution to this culture of secrecy is motivated not only by the knowledge that civil servants are committing fewer decisions to paper but also that those civil servants tasked with responding to RTI requests are often told to interpret the act creatively to avoid releasing information.

The concern about civil servants being thrust into political debates is valid, but this is not an RTIA-specific issue. Civil servants have been so thrust in many cases without the involvement of either the RTIA or the media: witness the recent Caisse Populaire de Shippagan affair. In any event, in the vast majority of RTI stories in our collective experience, civil servants more often than not turn out to have played precisely the role they were supposed to: providers of expert non-partisan advice. It is usually the politicians who run into trouble when an RTI request reveals what they did (or did not do) with the advice they were given. Again, the outcome does not alter the right. When an independent public service provides its best advice on a particular subject, the proper disclosure of information actually protects them, especially in a situation where a minister overruled their opinion for partisan purposes.

Instead of finding ways to block these records from being made public, there should be measures put in place so civil servants have more confidence in speaking truth to power and putting it on paper. There are systems proving to be successful in other governments that offer civil servants such protection, such as accounting officers. While adopting an accounting officer system may be outside the realm of this review, it is a component to a broader reform that could make the province a leader in disclosure and better government.

Case Study: The Scraba Report

There is a distressing trend of civil servants instructing outside consultants on how to avoid their reports being obtained through the RTIA. One recent example was Cary Grobe, the Department of Education's director of the evaluation branch, who advised Elana Scraba, an Alberta-based education consultant who authored a critical report on the province's education system.

Grobe sent Scraba an e-mail on March 4, 2002, explaining how to circumvent the RTIA through the broad, "advice to minister" exemption:

Any interim report, as well as the final report, should be labelled as 'advice or recommendation to the minister of education.' That statement on a government document exempts it from the Right to Information Act.

Not only is Grobe's interpretation of the RTIA incorrect, it is troubling that a civil servant would try to shield a report paid for by taxpayers on a subject of such pressing public interest, the education system. Although just one example, it provides a valuable insight into the current atmosphere surrounding the act.

The Gallery's Recommendations

The New Brunswick Press Gallery is committed to working with the task force and any other interested party in finding ways to make the province's RTIA a world leader. Democracy is strengthened when citizens have a full and complete accounting of how governments make decisions and spend their tax dollars. Public cynicism is bred by selectively disclosed information or when documents are blocked from scrutiny. The press gallery would like to offer some realistic reforms and measured responses to the task force's questions.

1) We recommend the legislation start with a preamble outlining the intent of the act.

For example the Nova Scotia Freedom of Information and Protect of Privacy Act starts out:

The purpose of this Act is

(a) to ensure that public bodies are fully accountable to the public by

(i) giving the public a right of access to records,

(ii) giving individuals a right of access to, and a right to correction of, personal information about themselves,

(iii) specifying limited exceptions to the rights of access,

(iv) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and

(v) providing for an independent review of decisions made pursuant to this Act; and

(b) to provide for the disclosure of all government information with necessary exemptions, that are limited and specific, in order to

(i) facilitate informed public participation in policy formulation,

(ii) ensure fairness in government decision-making,

(iii) permit the airing and reconciliation of divergent views;

(c) to protect the privacy of individuals with respect to personal information about themselves held by public bodies and to provide individuals with a right of access to that information.

This preamble is important because in cases where an applicant appeals a decision not to disclose, the ombudsman or judge can look to the preamble for guidance. Every time there is a dispute over whether a particular document falls under one of the legislated exemptions, the two sides can look to the act's preamble and will know exactly what the elected politicians desired when the act was passed.

The preamble could be as simple as:

The New Brunswick Right to Information Act is to ensure that all public bodies are fully transparent and accountable to the public so that citizens are guaranteed a right to information to make informed decisions in public policy formation, ensure fairness in government-decision making and allow the full airing and reconciliation of divergent views. The public's right to know and the public's interest will be paramount in disclosing information because a fully transparent and accountable government is sign of a healthy democracy.

- 2) We recommend the act include municipalities, the Legislative Assembly and all its officers, the Maritime Provinces Higher Education Commission, Atlantic Lottery Corp., the New Brunswick Innovation Foundation, and publicly-funded universities. For the act to be successful, the task force must address the bodies that are currently not covered by the existing legislation.

- 3) We recommend penalties for departments that do not respond within the 30-day limit without gaining the applicant's approval 15 days before the deadline. There must be some impetus for the bureaucracy to respect the legislated time limit.

- 4) We recommend that no request be delayed longer than six months without the written permission of the ombudsman including the reason for the delay and firm timelines on a response. This amendment will further protect applicants from unreasonable delays.

- 5) We recommend an independent Office of the Information Commissioner be established to oversee the act. A separate office of the legislature would not be distracted by other pressing files. If the task force decides against recommending a separate information commissioner, it is absolutely crucial that the Office of the Ombudsman receive a significant increase in its operating budget to establish a dedicated RTI bureau within the office.

- 6) We recommend no increase in the \$5 fee. The existing fee is accessible to ordinary citizens; any increase imposes an unnecessary price on democracy and transparency, which are not "cost-recovery" propositions.

- 7) We recommend a "public-interest override," a clause guaranteeing documents can be released if they are in the public interest regardless of exemptions. There is precedent for such a public interest override. In Ontario, documents must be disclosed that reveal a grave environmental, health or safety hazard to the public. As well, an applicant can apply to invoke the override when there is a belief that the document's disclosure should overrule the exemption.

8) We recommend penalties for civil servants who destroy records that should be released. This is not meant to be punitive, but to establish a deterrent that reinforces the gravity of destroying documents.

9) We recommend proactive disclosure for expenses by ministers, MLAs, deputy ministers and all political/exempt staff, government airplane travel logs, Larry's Gulch guest list, inspection records of hotels, restaurants, seniors homes and daycares. Ombudsman Bernard Richard already discloses his hospitality expenses; there is no reason why his office should be the only one in the New Brunswick government to do so.

10) We recommend the Information commissioner/Ombudsman be given the power to order disclosure. This would reverse the current onus: the government would be required to disclose all documents ordered released by the information commissioner/ombudsman unless the government successfully appealed the order to the Court of Queen's Bench. The government would pay all fees for such an appeal.

11) We recommend a "sunset clause" for documents deemed necessary to be shielded from public view. Dr. Savoie has previously argued for a sunset clause in a *Times & Transcript* article on Feb. 15, 2003:

"After a year and a half the decision is no longer pending, it hasn't been made," Savoie said. "If you use that, a decision pending, it is too easy, you can pend a decision forever."

12) We recommend a clear indication that civil servants' names should be disclosed when attached to public documents. There is no reason why the names of public servants are redacted. This is not a privacy issue because the civil servants are not acting as private citizens.

13) We recommend the information commissioner/ombudsman be required to name departments that have routinely abused or violated the RTIA, i.e. by not respecting the 30-day limit. This would be intended to motivate departments to comply.

14) We recommend any government services privatized in whole or in part remain under the RTIA for 10 years with an automatic 10-year extension that can only be stopped with a successful appeal to the information commissioner. Firms contracting with the government to take over the delivery of services would be informed up-front that this aspect of their operations would be subject to the RTIA and they may withdraw from the RFP process if they do not recognize the importance of transparency.

15) We recommend a periodic public review of the RTIA every five to ten years. Dr. Savoie's task force is welcomed and is long overdue. Having a mandatory review will make sure New Brunswick's act stays current. Many of the problems facing the existing act could have been avoided if previous governments had included such a clause.

16) We recommend no designating of requests as "frivolous or vexatious." It is dangerous when institutions are allowed to arbitrarily define frivolous or vexatious.

17) We recommend no fees be charged if a department or institution misses the 30-day deadline. This measure is not to be seen as punitive, but would provide another much-needed impetus for compliance. At present, there is nothing to prevent departments from ignoring the legislated deadline.

18) We recommend, when possible, that documents be sent to an applicant electronically or on CD to cut down on copying fees. This is an obvious recommendation that would reduce the costs that governments often cite as a reason to block disclosure.

19) We recommend Executive Council Office name Right to Information co-ordinators in each department instead of having departmental employees process RTI requests on top of their other work. The situation leads to inevitable conflicts of interest in which a public servant may have to choose between the intent of the act and the political wishes of his or her minister. Additionally, departments often explain delays in compliance by stating that the employee processing the request has been "too busy" to meet the 30-day deadline.

20) We recommend that the RTIA require that all contracts entered into by institutions covered by the law include a clause that ensures records generated during the contract remain in the control of the institution and covered by the RTIA.

21) We recommend civil servants must produce "information" for any government transaction or public policy decision so the public can be assured to have a full understanding of how decisions were made and tax dollars were spent.

22) We recommend cabinet documents be available unless those documents "reveal the substance of deliberations of cabinet." The existing 6 (g) exemption is far too broad and has been misused by

governments. Ombudsman Bernard Richard has ruled in favour of disclosure repeatedly but it should not be up to applicants to be forced to appeal.

23) We recommend that the sunset clause on cabinet documents be shortened to 10 years, keeping in line with Nova Scotia. There is no reason why governments maintain such long sunset clauses on cabinet documents.

24) We recommend that exemptions be discretionary, not mandatory. If there are to be narrowly defined exemptions contained in the act, they should be discretionary, so that in specific cases even they can be overruled.

25) We recommend that a “proof-of-harm” test should limit the discretion, under all exemptions, to withhold a document. Forcing a department to prove that a harm will be committed if a document is disclosed raises the bar and should improve transparency.

Response to the Discussion Paper (2): Response to Dr. Savoie's Questions

1. The context.

1. All information, with the exception of personal information about individuals, is of potential interest to journalists. The best method of access is to make as much of the information as possible public by default – by having material filed electronically and easily downloadable, without the need for a formal request.
2. Other than information that falls within very narrowly defined exemptions, all information should be available without a request.
3. Size-of-request limitations would inhibit public access and create an artificial hierarchy of information, with smaller records more easily accessible and larger records less accessible – without regard to the merits of access. If most documents were generated electronically and made accessible by default, this would ease the burden of processing large requests.

2. Scope of the Right to Information Act – Institutions.

1. No. The legislation should be extended to cover the Legislative Assembly, including the Speaker, officers of the Legislature, commissions, boards, and agencies.
2. The current act states in its definition of a "department" in subsection (D) that any body or office is covered by the act that received funds appropriated through the Consolidated Fund. This definition has not served the province well; the criteria should be whether the institution is a legislative or regulatory creation of the province of New Brunswick.
3. Adding an institution could be done by regulation. Removing should be done by legislation. This renders it easy for government to increase access but more burdensome to restrict it.
4. Yes, municipalities should be covered by the act.
5. Yes, universities should be covered by the act.
6. Yes, policing agencies should be covered by the act with reasonable exemptions applying to criminal investigations, etc.
7. Yes, the act should include other government agencies, boards and commissions.

3. Access Process.

1. government shifted to the generation of all documents in electronic format, an online electronic request and response would be feasible. (An analogous system would be the PACER system for U.S. federal courts, which requires all court filings to be done electronically, and which allows any member of the public to access files, paying by credit card. See also the government of Estonia, http://www.vm.ee/estonia/kat_175/pea_175/2972.html) An important caveat would be that all documents would need to be available electronically, with government officials barred from using paper records to deliberately avoid compliance with the act. Hand-written notes, for example, would be scanned as PDF documents or JPEG images.
2. If the government adopted 3.1, the process would be less expensive and more efficient.
3. No distinction should be made. If access is a right, there should be no hierarchy of rights.
4. No limit should be in place. This creates an arbitrary restriction on what may be legitimate requests.
5. A modest fee is acceptable but it should not rise beyond the range described in the discussion paper.
6. Moderate cost-recovery fees for large requests are acceptable, but there should be a minimum number of pages before any such fee applies – for example, 500 pages. There should also be a cap on cost-recovery fees – for example, \$200. High fees deter access and put the onus on the citizen to shoulder the cost of government meeting its statutory obligations. Again, digital

documents would make this question less of a concern.

4. Review process.

1. Yes. The current ombudsman has treated RTI appeals seriously but until the act is changed to reverse the onus and allow a government to be ordered to disclose information, it is absolutely critical that those not satisfied with the province's response -- or the province's failure to adhere to the ombudsman's ruling -- have the avenue to take the appeal to the Court of Queen's Bench. Citizens should have the option to take any appeal to the Court of Queen's Bench.
2. An independent commission would be ideal, but if government makes a decision to not shoulder the expense of a new commission and staff, the power of the ombudsman should be increased. Specifically, the ombudsman should have the power to order disclosure of records, with the onus on government to challenge his/her decision by demonstrating why access should be denied.

5. Administration.

1. Again, an arm's-length office to process requests would be ideal. The press gallery believes that the province should, failing the recommendation to create an independent officer, establish a separate office within government that would oversee RTI requests as well as have a role in promoting the act. Although cost savings should not be the driving force behind the change, creating a stand-alone office would be more efficient: RTI co-ordinators now have other responsibilities in departments. Larger departments, such as health and education, may require one full-time person each; two or three smaller departments might share a single RTI officer. The officer gains institutional knowledge on who to talk to directly. Meanwhile, civil servants are removed from potential conflicts between complying with the act and enduring political pressure for non-disclosure.
2. The 30-day time limit could be extended with the requestor's consent, but the government would need to seek the requestor's agreement to a new deadline in writing before the end of the 30-day time limit. These extensions should happen in 30-day increments. The requestor should also have the right to have records already retrieved (i.e. a partial fulfillment of the request) delivered immediately, with the balance to follow.

3. There should be restrictions in place to prevent exempt staff (i.e. executive assistants, political staff) from having any role in the processing of Right to Information requests.

6. Privacy

1. Consultation with third parties opens the door to lengthy delays while those third parties contest release. A company that receives government funding, for example, ought not to be able to slow down a request for records on how government decided to provide the funding. Once a company requests public funds, it should have a reasonable expectation that the government's records related to the request will be subject to public scrutiny. An explicit requirement might be part of the funding agreement.
2. The Manitoba legislation is too restrictive. It is reasonable for a corporation's financial information to be exempt in some cases, but it is unreasonable for government's deliberations about awarding a contract or providing a subsidy to fall under that exemption.

7. Limitations on Access.

1. There is a growing trend in documents recently released to journalists under the Right to Information Act to black out the names of civil servants who authored memoranda, e-mails, etc. The government cites the need to protect personal information. This is a recent development and a troubling one. When a civil servant communicates within government, he/she is not acting as a private citizen whose communications merit the same protection as, for example, a personal phone call or medical records. The civil servant is acting as an agent of the Crown and the government, and his/her communications should be subject to scrutiny. From a practical point of view, putting an end to this trend of blacking out the names of civil servants also avoids the misunderstandings and inaccuracy that can stem from incomplete disclosure. It makes it impossible for a journalist to keep track of who is advancing a particular opinion. There are examples of disclosures before this trend took hold in which the journalist was able to highlight, for example, a civil servant who had argued against an expense that later turned out to be wasteful—an illustration of how greater access can enhance the reputation of civil servants, and an argument against the notion that more access will lead to more "gotcha" stories.

Questions 8-10: While important, the issues surrounding government collection of personal information are not central to the role of the Press Gallery and we offer no opinions, other than the observation, perhaps obvious, that individual citizens have the right to have their information protected.

