

**Questions in POPIA/RTI Task Force Paper
Responses from the Canadian Bar Association New Brunswick Branch – Privacy
Law Section**

1.1 What type of information does the government hold that would be of interest to you/your organization/business in the future?

Government policies, proposed regulations and legislation.

What method would you prefer to use to access this information?

Internet -- Electronic access for Right to Information requests.

1.2 What type of information do you think should be routinely available from government without a request under the *Right to Information Act*?

Policies/ guidelines, information otherwise publicly available and soon to be published information.

1.3 A request under the *Right to Information Act* can be for one page of records or over a million pages. The access to information legislation in many countries provides for practical limits on a citizen's right of access, such as excessive costs to the taxpayers of providing the information, the undue disruption of governmental operations or repetitive requests. In your experience, has the lack of similar limitation in the New Brunswick legislation been problematic?

No.

Yes

Would you favour legislature amendments in support of such limitations? If so, which ones? In your view, what should be the criteria?

Voluminous files or files which request a large number of records should be treated in a way in which the government department responding to the request can respond appropriately. An extension of time provisions such as these found in section 27 of the Ontario *Freedom of Information and Protection of Privacy Act* might be one way to deal with such large requests. This provision reads as follows:

27. (1) A head may extend the time limit set out in section 26 for a period of time that is reasonable in the circumstances, where,

(a) the request is for a large number of records or necessitates a search through a large number of records and meeting the time limit would unreasonably interfere with the operations of the institution; or

(b) consultations with a person outside the institution are necessary to comply with the request and cannot reasonably be completed within the time limit.

Notice of extension

(2) Where a head extends the time limit under subsection (1), the head shall give the person who made the request written notice of the extension setting out,

- (a) the length of the extension;
- (b) the reason for the extension; and
- (c) that the person who made the request may ask the Commissioner to review the extension.

The above noted provision allows the head of the institution to provide the requester with a Notice of Extension where the file contains a large number of records and where meeting the time limit would unreasonably interfere with the operations of the institution. There is also a provision which allows a requester to ask the commissioner to review the extension of time. This is found in paragraph 2(c) of the above noted provision.

2.1 In your view, is the current coverage of institutions under the *Right to Information Act* adequate?

No. The definition of “department” in section 1 of the *Right to Information Act* is restrictive. The *Act* only applies to 66 bodies listed in N.B. Reg. 85-68 under the *Right to Information Act*.

2.2 What criteria should be used to determine whether or not an institution would be subject to the *Act*?

Any government funded body should be subject to the *Act*, including Service New Brunswick in particular, as it manages significant amounts of personal information about New Brunswickers (and others), much of which would be classified as “sensitive”.

A number of institutions which are covered in other jurisdictions under the provincial freedom of information legislation are not included in New Brunswick. For example, the Workplace Health, Safety and Compensation Commission is not listed in Schedule “A” under the provisions of the *Right to Information Act* whereas in most other jurisdictions this agency and agencies of this type are covered by the right to information legislation.

The nature of the information is one factor that should be considered to determine whether or not an institution should be subject to the *Act*. Information such as health information falls within the definition of personal information but can be far more sensitive than information relating to a contract or other information held by government.

Health information should, if submitted, be regulated by specific legislation which is designed to address the nature of health information. This would mean that the Regional Health Authorities should not be listed under the provisions of the *Right to Information Act* and if the *Act* is to extend to other institutions which collect, use or disclose health information that the health information portion would be exempt from the application of the general right to information legislation but would be subject to legislation regulating health information.

2.3 By what mechanism should institutions be added or removed from the list of those subject to the *Act*? (For example, legislation would require approval from the Legislative Assembly, while regulations would require only Cabinet approval.)

Regulation.

In some jurisdictions what has been done is that an institution is defined under the provisions of the legislation to include departments of government and agency board commissions or corporations that are designated in the regulations. This ensures that the government itself is covered and that other government entities may be added by way of listing them in the regulation.

2.4 Should the *Act* include municipalities?

RTI – no but POPIA – yes as the Federal Privacy Commissioner has stated that PIPEDA does not apply to the core activities of the MUSH (municipalities, universities, and hospitals). In the absence of any private sector privacy legislation

Definitely

Ideally the legislation should apply to municipalities however unless the municipalities are consulted prior to amending the legislation and unless money and resources are provided to municipalities for training, there is not much point in adding municipalities to the legislation.

2.5 Should the *Acts* include universities?

See above re municipalities.

Yes -- but concerns re: academic freedom/ possible intellectual property concerns means that a carefully tailored provision would be required.

2.6 Should the Acts include policing agencies (the federal law already applies to the RCMP)?

Yes but with specific limitations appropriate to the sensitivity of the information and consistent with the Privacy Act limitations imposed on the RCMP.

Yes

2.7 Should the Acts include other government agencies, boards and commissions? Please identify.

Service New Brunswick, Workplace, Health and Safety Compensation Commission, but in relation to WHSCC, specific consideration should be given to ensuring compliance with specific health information protection legislation.

If municipalities are to be included in the application of access to information legislation then District Education Councils and parent school support committees should also be included.

3.1 Do you think the processes for making and responding to requests under the Act could be made easier and more effective? How?

Yes. A centralized agency to receive and direct requests (and then vet possible refusals in consultation with the relevant department) would be helpful.

A provision should be added allowing for a request to be forwarded to the appropriate department and this should include the ability to transfer a request to another department that has a greater interest in the record or that created the records. An example of this type of provision is found in section 25 of the Ontario *Freedom of Information and Protection of Privacy Act* which reads as follows:

25. (1) Where an institution receives a request for access to a record that the institution does not have in its custody or under its control, the head shall make all necessary inquiries to determine whether another institution has custody or control of the record, and where the head determines that another institution has custody or control of the record, the head shall within fifteen days after the request is received,

- (a) forward the request to the other institution; and
- (b) give written notice to the person who made the request that it has been forwarded to the other institution.

Transfer of request

(2) Where an institution receives a request for access to a record and the head considers that another institution has a greater interest in the record, the head may transfer the request and, if necessary, the record to the other institution, within fifteen days after the request is received, in which case the head transferring the request shall give written notice of the transfer to the person who made the request.

Greater interest

(3) For the purpose of subsection (2), another institution has a greater interest in a record than the institution that receives the request for access if,

(a) the record was originally produced in or for the other institution; or

(b) in the case of a record not originally produced in or for an institution, the other institution was the first institution to receive the record or a copy thereof.

When transferred request deemed made

(4) Where a request is forwarded or transferred under subsection (1) or (2), the request shall be deemed to have been made to the institution to which it is forwarded or transferred on the day the institution to which the request was originally made received it.

Institution

(5) In this section,
“institution” includes an institution as defined in section 2 of the *Municipal Freedom of Information and Protection of Privacy Act*.

**3.2 Are there ways to reduce the costs of processing access to information requests?
Are there ways to make the process more efficient?**

One way to reduce the costs of processing access to information requests is to ensure that there is a provision which allows for an institution to refuse to provide access to a record if the request for access is frivolous or vexatious.

There should also be a mechanism in the legislation to provide for notice to an affected person. This would allow an affected person or third party to provide input with respect to the disclosure of information relating to that individual or company.

3.3 Currently all requests are treated the same, whether the results are for personal use, commercial use or a public interest use. Should different categories of requests or requesters be treated differently under the Act? (For example: general public/MLAs/commercial users/media/non-profit/associations/professional requesters who sell the information) If so, what criteria should be used to distinguish between requesters? And what different treatment should they receive?

3.4 Currently there are no limits on the number of requests that one person or organization can make to any institution at any time. Should the Act limit the number of requests from a single requester to be processed at one time? By one institution? Within a year?

Absolutely not.

3.5 Most jurisdictions charge application fees (\$5 to \$15 - \$5 in the case of New Brunswick) are charged to discourage people from making frivolous requests for information. If someone is willing to pay even a small application fee, they tend to be serious about it. Do you think government should continue to charge an application fee for each information request?

Yes

3.6 Do you think there should be a fee structure? Do you think that fees should be established on a cost recover basis or should the costs of administering the right to information legislation be drawn out of the consolidated revenue fund? In other provinces, applicants are charged an hourly fee for the amount of time it takes to search and prepare the requested documents in addition to any copying fees. In some cases, people are only charged preparation fees if their request takes longer than 2 or 3 hours to get ready. And, sometimes, fees can be waived under certain conditions. What features do you think a fee structure should have to make sure that it is fair to everyone?

A sliding scale based on volume/ time required might be appropriate for institutional/ commercial/ media requests. But to keep it meaningfully open to individuals, there should be no scale for "private citizen" requests.

4.1 Does having the choice of these two review options (i.e., the Court of Queen's Bench and the Ombudsman) provide people with reasonable access to fair and independent review of their access and privacy concerns? Please explain.

Yes. Ombudsperson is generally appropriate, but in some cases, a ruling from the QB is useful for defining what the law should be. The option of going straight to a judge is helpful then.

No. Having two review options results in inconsistent decisions or recommendations and confusion in terms of those individuals who are attempting to provide access to information and those requesting access to information. In order to ensure compliance with the provisions of the legislation it is important to ensure that there is an individual or organization which has sufficient expertise in the area to provide education and support in addition to making decisions with respect to access requests. The two review options are not working in this province because the Court of Queen's Bench and Ombudsman are not necessarily providing consistent decisions and recommendations.

4.2 What changes, if any, do you think could be made to improve the review processes? A number of provinces have an independent Access and Privacy Commission. Do you believe that New Brunswick would benefit from such a model or is compliance through the Ombudsman office sufficient?

A separate access & privacy commission should be established.

The ombudsman seems to be wearing an awful lot of hats. An independent office for privacy and access review only might help to keep his/ her attention focussed and encourage expertise in that area.

If the Province is serious about ensuring that access and privacy laws are complied with it is necessary to have an independent access and privacy commission. The Ombudsman's office is potentially in a conflict of interest position operating under a number of different statutes. Additionally, the time and energy required to provide the educational component that is required is not currently being provided to New Brunswickers.

5.1 What do you think could be done to improve the application process that would be simpler for applicants to make clear and complete requests for information?

A standardized form that is well designed and uses clear English/ French would be helpful. But people should not be required to use the form.

5.2 If some kind of flexibility is built into the legislation that would allow the time for responding to an information request to go beyond 30 days, what kinds of limits should be put in place to make sure that responses continue to be provided in a timely fashion?

Perhaps permission from the ombudsman/ access commissioner should be required for each extension.

The types of provisions that are found in the Ontario *Freedom of Information and Protection of Privacy Act* which allow the head of the institution to extend the timeline and requires notification to the requester as well as the right to involve the commissioner in an extension of time should be considered.

5.3 Are there other specific improvements to the process for accessing information that you would suggest?

The definition of “appropriate Minister” should be amended to make it consistent. For example the definition currently provides that the appropriate Minister if the department is a Regional Health Authority is the chairperson of the board of directors of the Authority. The same is not true for the New Brunswick Power Distribution and Customer Service Corporation, the New Brunswick Power Generating Corporation, the New Brunswick Power Holding Corporation, etc. Where there is an independent body making decisions and holding information, the “appropriate Minister” should be the chairperson of the board of directors. This is for two reasons. First, it is their information and they are making decisions with respect to the information. Second, they must be able to justify the decisions that they are making and not merely require or request that the Minister, who may be in a conflicting position, attempt to justify their decision.

Where information is available elsewhere or is soon to be published, the *Act* could be amended to provide that this information may not be disclosed but that the individual requesting such information should be advised as to where it is available.

6.1 Should government be required to consult with third parties before they release information even if it could delay the release of the requested information by at least a month?

If the release concerns the third party, then yes – particularly if it is the confidential or business information of a corporation and, in the case of third party individuals, the disclosure should be limited to being only what is required, without breaching the individual’s privacy rights. As well, consideration could be given to shortening time lines in appropriate circumstances for a third party to respond – depending on the type of information sought.

If there is a legitimate interest on the part of the third party, an extension of time might be legitimately approved on that basis.

A provision such as section 28 of the Ontario *Freedom of Information and Protection of Privacy Act* should be included in order to provide that notice is provided to an affected person and that they have the ability to consent to the disclosure of the information or to provide submissions as to why information should not be disclosed. This provision reads as follows:

28. (1) Before a head grants a request for access to a record,

(a) that the head has reason to believe might contain information referred to in subsection 17 (1) that affects the interest of a person other than the person requesting information; or

(b) that is personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy for the purposes of clause 21 (1) (f),

the head shall give written notice in accordance with subsection (2) to the person to whom the information relates.

Contents of notice

(2) The notice shall contain,

(a) a statement that the head intends to release a record or part thereof that may affect the interests of the person;

(b) a description of the contents of the record or part thereof that relate to the person; and

(c) a statement that the person may, within twenty days after the notice is given, make representations to the head as to why the record or part thereof should not be disclosed.

Description

(2.1) If the request covers more than one record, the description mentioned in clause (2) (b) may consist of a summary of the categories of the records requested if it provides sufficient detail to identify them.

Time for notice

(3) The notice referred to in subsection (1) shall be given within thirty days after the request for access is received or, where there has been an extension of a time limit under subsection 27 (1), within that extended time limit.

Notice of delay

(4) Where a head gives notice to a person under subsection (1), the head shall also give the person who made the request written notice of delay, setting out,

- (a) that the record or part thereof may affect the interests of another party;
- (b) that the other party is being given an opportunity to make representations concerning disclosure; and
- (c) that the head will within thirty days decide whether or not to disclose the record.

Representation re disclosure

(5) Where a notice is given under subsection (1), the person to whom the information relates may, within twenty days after the notice is given, make representations to the head as to why the record or the part thereof should not be disclosed.

Representation in writing

(6) Representations under subsection (5) shall be made in writing unless the head permits them to be made orally.

Decision re disclosure

(7) The head shall, within thirty days after the notice under subsection (1) is given, but not before the earlier of,

- (a) the day the response to the notice from the person to whom the information relates is received; or

(b) twenty-one days after the notice is given,
decide whether or not to disclose the record or the part thereof and
give written notice of the decision to the person to whom the
information relates and the person who made the request.

Notice of head's decision to disclose

(8) Where a head decides to disclose a record or part thereof under
subsection (7), the head shall state in the notice that,

(a) the person to whom the information relates may appeal the
decision to the Commissioner within thirty days after the notice is
given; and

(b) the person who made the request will be given access to the
record or to a part thereof, unless an appeal of the decision is
commenced within thirty days after the notice is given.

Access to be given unless affected person appeals

(9) Where, under subsection (7), the head decides to disclose the
record or a part thereof, the head shall give the person who made the
request access to the record or part thereof within thirty days after
notice is given under subsection (7), unless the person to whom the
information relates asks the Commissioner to review the decision.

6.2 Do the restrictions set out in the Manitoba legislation provide a reasonable balance between the expectation of confidentiality by business and the need for government to remain open and transparent about its business dealings? If New Brunswick were to adopt this type of legislation, what concerns or improvements, if any, would you have to the approach that Manitoba has taken?

This requires review of the Manitoba legislation which has not been done but merits further work.

7.1 Are there existing limitations that you think have been interpreted too broadly or too narrowly? Are there limitations that you think are unreasonable? Are there any types of information that should be more or less restricted? Please explain why.

The exception "would disclose opinions or recommendations for a Minister or the Executive Council" has certainly been abused (see recent decision of Justice Russell in *NB Crown Counsel Ass. V. Min. of Office of Human Resources*, 2006 NBQB 320)

8.1 Are you satisfied that the information that government collects about you is being handled in such a way that your privacy is protected? If not, what concerns do you have? What more should be done to protect your personal information?

I am particularly concerned about agreements/ contracts that could be made with US companies and would therefore require the disclosure of information to the US government under the *Patriot Act*. This has come up in a few other jurisdictions, and I think it is only a matter of time before it happens here.

My concern with respect to privacy is that personal information being collected in New Brunswick is generally not subject to the application of legislation. Unless the personal information is under the custody of one of the 67 bodies subject to the application of the *Protection of Personal Information Act* or the federal *Personal Information and Protection of Electronic Documents Act*, this information is not protected by legislation in the Province of New Brunswick. My specific concern with respect to New Brunswick is that Service New Brunswick is not subject to the application of the *Protection of Personal Information Act* nor is it subject to the federal *Personal Information and Protection of Electronic Documents Act*. This means that in New Brunswick all information relating to births, deaths, motor vehicle registration, etc., etc. is not protected by legislation.

9.1 Do you believe that government should be allowed to create such an exemption?

The exemption does not seem to have been abused. But if one charity gets special treatment, others are likely to want it, too.

As long as the exemption is provided for in statute or regulation, government is able and should be able to create exemptions. Often times government needs to be able to create certain exemptions for certain types of information.

9.2 If such exemptions exist, should there be safeguards to ensure that the third party does not improperly disclose the protected personal information?

Yes. Use should be limited to the specified purpose for a fixed period of time following which there should be a corresponding return/destroy obligation as well as security safeguards in place appropriate for the nature of the information.

The difficulty with the current state of the law in New Brunswick is that privacy legislation applies only to those departments that are listed in the regulation under the *Right to Information Act* and the *Protection of Personal Information Act*. There is no further requirement that third parties who obtain access to this information not disclose the information. While the government departments collecting, using and disclosing personal information should ensure that third parties agree that the information will not be disclosed further, there are no legislative provisions currently in existence which extend to those third parties. Furthermore, there has been insufficient training of the public service with respect to the privacy legislation and there has been no money provided to ensure that the provisions of the *Protection of Personal Information Act* are being complied with by providing education and resources to government for this purpose.

9.3 If such exemptions exist, should there be a mechanism where you can have your personal information removed from the third party's control?

Yes

Definitely.

9.4 If such exemptions exist, what personal information should and should not be disclosed?

Only what is necessary for the intended purpose. And that purpose should be narrowly defined.

10.1 Do you have any concerns about the sharing of personal information between government departments?

Yes – there should be clear access management protocols implemented for various classes of information.

In addition to policies and procedures relating to the sharing of personal information between government departments, there also needs to be education and money provided for such education.

What types of restrictions, if any, should be in place to ensure that information is not used inappropriately? In your opinion, what rules or protections can be put in place that would allow government departments to share information between departments in the interests of good service delivery and reduced administrative burden, while ensuring that personal information is properly protected?

Departments need to identify the classes of information they require. Access and use should be limited to those classes of information, subject to exemptions as appropriate for the administration of government..

The most important and effective way of ensuring that information is not used inappropriately is to provide education to those individuals collecting, using and disclosing information. This requires, in addition to education and money, resources that can be relied upon by government institutions for assistance. A commissioner with the sole responsibility of ensuring compliance with access and privacy legislation is required in order to ensure that access to information is provided to individuals and that privacy is protected.

Other Concerns/Comments:

The report focuses very much on the administrative burden of fulfilling access to information requests as opposed to privacy protection to ensure adequate security measures (procedural and technical) are implemented.

The report is silent with regard to the need for private sector privacy legislation which is of particular significance given that PIPEDA does not protect employee information.

As commented on above, a separate privacy & access commission should be established. One of its mandates should be to monitor the evolution & development of fair information practices in other jurisdictions and harmonize our practices with those in other jurisdictions, as much as practical.

As commented on in the PIPEDA review, there should be a balanced privacy breach notification requirement to impose a duty to notify individuals in limited circumstances where:

- (a) an organization is not covered by security mechanisms or has received notice that protection mechanisms have been breached/tampered with; and,
- (b) the information that has been comprised is sensitive personal information.

Policies should be implemented not only for inter-department sharing of information, but also for outsourcing.

Legislation may be enacted which improves the right of access and the protection of personal information. However, without government interest and support in ensuring that the legislation is complied with, nothing will change. In order to ensure that government does comply with legislation, education and resources are required for the purpose of complying with requests for information. The public service requires education with respect to the collection, use and disclosure of personal information and a uniform decision maker providing consistent decisions with respect to the issues is also required.

Submitted by: Canadian Bar Association New Brunswick Branch – Privacy Law Section