

Inside and Outside the Box:
Proposals for an *Information and Privacy Rights Code*
for New Brunswick

A submission to the New Brunswick Task Force on
Right to Information and Protection of Personal
Information

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July 5, 2007

Information is the currency of democracy.

Ralph Nader

It is easy to think the State has a lot of different objects -- military, political, economic, and what not. But in a way things are much simpler than that. The State exists simply to promote and to protect the ordinary happiness of human beings in this life. A husband and wife chatting over a fire, a couple of friends having a game of darts in a pub, a man reading a book in his own room or digging in his own garden -- that is what the State is there for. And unless they are helping to increase and prolong and protect such moments, all the laws, parliaments, armies, courts, police, economics, etc., are simply a waste of time.

C.S. Lewis, British author and commentator

The *Right to Information Act* and the *Protection of Personal Information Act*, like the *Civil Service Act* and the *Ombudsman Act* are cornerstone statutes in achieving democracy, the rule of law and good governance in this Province. Democracy only exists where there is an informed citizenry and where electors can choose their representatives and judge their opinions and actions on the basis of the same information that has informed them. On the other hand, privacy is the very hallmark of the security we have bargained for in subjecting ourselves to the rule of law. Therefore, engagement with the democratic process and respect for rule of law will be undermined when public authorities fail to protect the privacy of citizens. The proper administration of laws establishing informational rights and privacy rights is therefore every bit as essential in a free and democratic state, as are the administration of a public service on the basis of merit, and an accessible review mechanism to protect the citizen's right to fairness, accuracy and reasonableness in the administration of the laws of the Province.

The mandate of the Ombudsman in this province is therefore an enviable, but also a daunting one. It makes sense, because of the democratic audit function involved in each of these laws, to combine these several mandates in one office. Moreover, in a small province there are inevitably important economies to be had in doing so. Add to these mandates the complaints function under the *Archives Act*, and a new mandate to be an advocate for Children and Youth, a constituency among the disenfranchised with whom Ombudsman the world over are well-acquainted, and the challenges become even more considerable.

The creation of a Task Force on Right to Information and Protection of Personal Information has therefore been a welcome opportunity to review and reflect at length upon this aspect of my mandate as Ombudsman. In past annual reports I have recommended that the *Right to Information Act* (and by reference) the *Protection of*

Personal Information Act be extended to apply to Universities and Municipalities. I have recommended that more training be carried out for those tasked in public bodies with the administration of these laws. Most recently I have recommended an independent review of this area of law and a significant new investment of resources to administer Right to Information and Privacy Protection laws.

I am therefore very pleased that, early in its mandate, the new government has named an independent task force to report to government on these issues, and that the Task Force, through its consultation document, has opened the door wide to suggestions for reform. In my view the legislation and its administration in this province needs a great deal more than tweaking. In order to guarantee New Brunswickers the same informational and privacy rights that other Canadians' enjoy, and in order to position our industry and information technology sector on par with other industry leaders, a substantial rewrite of our legislation is in order.

By codifying all our existing informational and privacy rights laws into one statute the province could best consolidate our practice with that of other jurisdictions and effectively guarantee the fundamental rights of New Brunswickers in the area of privacy protection and access to information. It is also the best means of ensuring that all privacy and informational rights are understood and applied as correlative rights, or as "a seamless code", as our Supreme Court has repeatedly stated. This should also help ensure that health information managers, police officers, university managers, human resource managers and journalists are all guided by the same set of rules, even though they may be applied quite differently in these various sectors of activity. Finally, a codified approach is perhaps best suited to the identification and implementation of additional resources that are required to bring about the necessary culture change in our public and private sectors to give meaning to these essential rights.

In the pages which follow, I will try to cover all the issues raised by the task force in its consultation document but to frame them also with reference to my own comments and experience as the agent responsible for the oversight of these laws for the past several years. I want to first place our current legislation in historical context, commenting on the public policy imperatives for reform, be they political, administrative or economic. I will then focus more specifically on the aspects of informational rights and privacy rights in turn, before dealing with the administrative aspects and enforcement mechanisms of proposed legislative reforms. I also want to comment separately in closing on the application of a revised privacy law to the private sector. Finally I will address in a separate submission to the Task Force on Health Information laws, my comments on this aspect of law reform, it being understood of course that, in my view, these too should form part of a single statute that would codify Access to Information and Protection of Privacy laws in the province.

A man must keep a little back shop where he can be himself without reserve. In solitude alone can he know true freedom.

Montaigne, *Essais*, 1588

Man is the only animal that blushes -- or needs to.

Mark Twain, 1835-1910

Part I – The legislative context: its history

Before embarking on any process of law reform it is helpful to look back upon a statute's history and the original legislative intent. The history of Right to Information legislation in New Brunswick, and in Atlantic Canada generally, need not make us blush – lest it be with modest pride. New Brunswick was in fact the second jurisdiction in Canada to adopt such legislation in 1978, one year after Nova Scotia had pioneered in this area. The next province to follow suit in 1981 was Newfoundland and Labrador, followed by Quebec.

On July 1, 1983 the federal government proclaimed the *Privacy Act* and the *Access to Information Act*. The *Access to Information Act* had no federal precedent, the federal *Privacy Act*, repealed and replaced privacy provisions set out in the *Canadian Human Rights Act* since 1977. Following that lead other provinces, starting with Manitoba (1985), then Ontario (1987) adopted Access to Information and Protection of Privacy laws, based upon the Quebec and federal models. It was not until much later that the Atlantic Provinces developed privacy laws of their own. Nova Scotia amended its law to move to an ATIPP or FOIPPA model in 1993. PEI adopted legislation in 2001, Newfoundland in 2002, but the access provisions of that statute came into force in January 2005 and the Privacy provisions are not yet proclaimed.

In New Brunswick, the department of Justice circulated a discussion paper on the topic of the protection of personal information and electronic documents in 1994. After much consultation, recommendations were brought forward in 1996. The thought at that time was that the province should not rewrite its access laws which were working well, but should in fact take a minimally interventionist approach by adopting a shell statute. That is to say, the legislator would adopt the Canadian Standards Association's Model Privacy Code and give it a statutory framework. In that way the voluntary norm would be given force of law, but only with respect to public bodies. At the time, Quebec had already adopted Privacy protection laws that applied to its private sector and there was considerable pressure by the Europeans to require all Canadian jurisdictions wanting to increase trade and commerce with Europe to adopt similar privacy laws. New Brunswick's approach was decidedly minimalist. Public sector bodies would walk the walk and abide by the CSA Model Code which itself was based upon OECD principles dear to the hearts of our European trading partners. The private sector would be left alone and invited to follow the public sector lead. Separate private sector legislation, based upon the same CSA standard could easily be exported to the private sector if it did not substantially comply on a voluntary basis. New Brunswick's *Protection of Personal Information Act* (PoPIA) was adopted in 1998 and proclaimed in 2001.

Unfortunately between 1998 and 2001, further trade and commerce negotiations between Canada and Europe led to the adoption of the *Personal Information and Protection of Electronic Documents Act* (PIPEDA). Pressured by its trading partners, the federal government used its Trade and Commerce power to adopt a Canadian privacy law that regulated the entire private sector. Provinces like Quebec which had substantially similar legislation in place would not be subject to a federal legislative override. By January 2004 only Alberta and British Columbia had joined Quebec in adopting substantially similar legislation, and as of that date PIPEDA has applied to private sector organizations involved in commercial activity in all other provinces, including New Brunswick. Like PoPIA, PIPEDA is basically a shell statute which does little more than give a statutory framework to the same 10 privacy principles set out in the CSA Model Code. In other words New Brunswick private sector businesses did not get the chance to prove themselves worthy of self-regulation in privacy matters, the federal government, under pressure from Europe, has made that kind of privacy compliance a statutory requirement.

In completing this brief historical context, it is worth tracing back also the comparative law analysis with respect to informational and privacy rights in jurisdictions outside of Canada where they were pioneered. Our access law, which was among the first in Canada was in fact modeled on Scandinavian and American statutes which had developed in the post war years as a protection against the pervasive reach of the welfare state. As government regulated ever-growing aspects of our lives several western liberal democracies developed Freedom of Information laws to protect against the state's omniscience and to keep governments transparent and accountable. The rise of data processing and computing only intensified these legislative developments. At the same time however, other liberal democracies preferred other means to curb the encroachment of the information age upon liberty. The French, Dutch and Germans adopted in the early to mid-1970s data protection laws aimed at protecting privacy by tightly regulating the development of any data-processing applications that involved the treatment of personal information.

Thus early on the seeds were sown for distinct regulatory models over which Americans and Europeans continue to trade barbs today. Is it sufficient, in order to protect essential freedoms, to insist that governments be open and transparent and accountable in the manner in which they treat the personal information of their citizens? Or is it necessary and preferable in order to protect privacy, as the handmaiden of liberty, to closely monitor and regulate the flow and processing of information, by public and private operators, particularly as it relates to the private lives of individuals? Today, the debate before European courts over the validity of US Data Safe-harbours as a compliance mechanism with the European Directive is an echo to the earlier philosophical debate over the privileged means for protecting freedom. Europeans and Americans remain relatively entrenched in their views, even though progress has been made on all sides recognizing that while Freedom of Information laws and Data Protection laws seek similar ends through alternate means, they are not necessarily antithetical. Canadians, as usual, compromise by seeking to agree as much as possible with all sides and by developing a body of law which treats both these foundational rights as correlative and complementary.

Any review of American or European jurisprudence in this area points up one further significant distinction, and that is the constitutionalization or foundational nature of the rights in question. American constitutional law and the Treaty of Rome (Europe's Human Rights Convention) both contain very explicit guarantees with respect to the inviolability of one's home, one's correspondence and one's privacy. On the other hand, Canada's Supreme Court has had to reverse engineer similar protections under our Charter of Rights by breathing new life into the words of section 8 (protection against unreasonable search and seizure) and section 7 (life, liberty and security of the person).

Moreover our courts have also recognized the quasi-constitutional status of laws in Canada which protect informational and privacy rights. This is an important distinction because such laws, as they protect foundational rights, are given precedence in case of conflict with other statutory provisions. It would be important in codifying the law in this area in New Brunswick to recognize the primacy that the rights set out in the statute should be afforded. A rights based framework for the Code would confirm the developments in our constitutional law as they relate to sections 7 and 8 of the Charter and most appropriately guarantee the rights which New Brunswickers have come to enjoy and consider foundational.

It is recommended that all New Brunswick statutes dealing with the right to information, records management and the protection of personal information and privacy of New Brunswickers be unified in a single Informational and Privacy Rights Code and that the rights set out in this Code be established as having precedence over other statutory provisions in case of conflict.

Big Brother in the form of an increasingly powerful government and an increasingly powerful private sector will pile the records high with reasons why privacy should give way to national security, to law and order, to efficiency of operation, to scientific advancement and the like.

William O. Douglas, US Supreme Court Justice,
In Points of Rebellion, 1969

The legislative context: its application and the need for reform

Since 2001, the application of PoPIA has been relatively unobtrusive. There was a spat of training for employees in all departments when the Act was proclaimed. However relatively few complaints have been received. High profile complaints have been filed in the past three years against government Ministers, but otherwise the law has had little or no impact. In fact even though violations under the Act were the occasion for two Ministerial resignations and the resignation of Premier Lord's Press Secretary, investigation of the related complaints confirmed that much work remains to be done to change the bureaucracy's dominant culture from one of secrecy to one of transparency and respect for the privacy of private citizens. Proclaiming a new law will not suffice. The law needs to be enforced through an important training effort, new ways of doing

business in government, new means of managing information and a commitment of resources to see this change through to the point of actually changing the work culture.

There is no denying that the main driver for legislative reform in New Brunswick in this area today is political. The new government was elected on a platform to review the *Right to Information Act* and to make government more accountable. Echoing developments on the federal scene, public accountability remains, for the time being, the political flavour of the day. But as the recent federal reforms in the area of right to information have amply demonstrated it is one thing to promise accountability in government, it is quite another to do a good job of delivering on that promise. Whether it is the political fall-out from the Pothier, Huntjens and Fowlie resignations or from the Gomery Commission Inquiry, or the ricochet north of the border of the USA Patriot Act or Enron, the public perception is that: 1) public officials have too many secrets; and 2) they are not very good at keeping them. In this context, it's important that the changes proposed amount to something more than window-dressing. To be coy, one could say that in the area of privacy and informational rights, New Brunswickers are ready for transformational change.

However, quite aside from this political driver, it is fair to note that reform in this area makes good business sense. In the mid 1990s government estimated that better laws protecting privacy were essential to the development of our knowledge based economy. It was felt however that a self-regulatory approach would be more business friendly. In hindsight, that may have been a miscalculation. The rest of the country, like most of the rest of the world, has taken a different approach and is now dragging us along in its wake. Over the past ten years, New Brunswick's knowledge industry has failed to grow apace with its promise and failed to maximize the competitive advantage that its research centers, fiber optics network, bilingual work-force and household internet penetration rates had to offer. Our laws have also failed to keep pace with the protocols and security practices which commerce in an on-line world increasingly demands. We have been laggards rather than leaders in an aspect of government regulation that is critical to our economic growth. While this sector of the economy continues to hold great potential for the province, our privacy and information management practices must be exemplary if the IT sector in this province wants to compete globally.

A final, but influential driver in the push for law reform on access and privacy issues has been the system of government itself. Those who work daily with the administration of these laws in the province know full well that our practices and investment of resources and effort do not measure up with other Canadian jurisdictions. This, however, is a sword that cuts both ways. While government administrators will be quick to admit the lack of investments in this area of administration, they will also be quick to point out provisions from laws of other provinces that would ease the burden of administration, or potentially allow new exemptions where none existed before. When I recommended in my last annual report that law reform in the area of access and privacy laws should be tasked to an independent commissioner reporting to the Legislature it was indeed to ensure against this danger. The Task Force must make its first priority ensuring that the reforms proposed meet the legislative purpose of achieving greater transparency and greater

privacy protection, rather than the opposite. While departmental officials have considerable experience administering our *Right to Information Act*, on the privacy side, the fact is that within government we barely know enough to even ask the right questions. As for access, I am in fact concerned that some of the questions framed in the Task Force's consultation document seem favourable to higher fees for accessing information, or pander to the concerns of civil servants who are tired of working in glass houses while being told increasingly to work along business models. Let's make no bones of the fact that work in the civil service is demanding and often unforgiving, but let us not lose sight of the fact that civil servants and the laws they uphold are never self-interested but are resolutely and steadfastly oriented towards the public good.

It is recommended that the Task Force must consider more than mere law reform, and that, in order to effect an actual change in culture consistent with the reinforced legislative purpose, a significant investment of new resources is required in terms of legislative oversight, central coordination and administration of the new legislation and improved staffing of privacy and information officers across government departments and agencies, along with adequate training for all those concerned.

Everything secret degenerates, even the administration of justice; nothing is safe that does not show how it can bear discussion and publicity

Lord Acton, British Historian, 1861

...a nation that is afraid to let its people judge the truth and falsehood in an open market is afraid of its people.

John F. Kennedy, American President, 1961

It is a question of power and we all know that those who have information are those who wield real power. But in a democracy such as ours, power and information must be widely shared... [Government] information belongs to the people of Canada, unless there is a very specific and fundamental reason for keeping it secret.

The Right Honorable Joe Clark, Prime Minister of Canada

Part II – Informational Rights

Taking the right to information seriously means engaging in the process of law reform with the aim of providing citizens with a right to information law that is up to world standard. In parts of the world where the democratic tradition is not as strong as ours this could be an insurmountable challenge. However, in this area of democratic governance New Brunswickers are capable and deserving of a world standard. In January 2000, the United Nations Commission on Human Rights adopted 9 Principles on the Public's Right to Know to guide the preparation of Freedom of Information Legislation. These

principles, set out in Appendix 1 to this submission have direct bearing on many of the questions raised by the Task Force in its Consultation Document.

It is recommended that the proposals for law reform in the area of informational rights in New Brunswick be consistent to the greatest extent possible with the Principles on Freedom of Information Legislation adopted by the United Nations Commission on Human Rights.

Routine Access

In keeping with these universal standards, it is submitted that the law in New Brunswick would also be greatly improved by providing specifically that public bodies are subject to an obligation to develop routine access policies. These policies would themselves be broadly distributed and should outline the documents and records which the public body formally undertakes to publish regularly and free of charge. In an era of on-line government more and more public records should be available in this manner. Public records that could be made available under such routine access policies include: annual reports of all public bodies, archives of press communiqués, special reports of administrative Task Forces, Consultation papers, Commissions of Inquiry, records of administrative and quasi-judicial decision-making, expense reports of public officials, archived access to public tendering processes and records of decisions in relation to such bidding processes, to name a few.

It is submitted that a new Informational and Privacy Rights Code for New Brunswick should include provisions requiring public bodies to adopt and disseminate Routine Access policies.

Fees and Costs

The Ombudsman's Office has not had any significant record of complaints with respect to the fee or cost structure under our *Right to Information Act*. Generally, the \$5.00 filing fee has been duly filed and collected in cases we have reviewed and public bodies have generally favoured the view that all fees and copying charges should be waived where the petitioner is seeking access to his or her own personal information. The 10 cent per page photocopying charge is consistent with market rates and has not in our view posed a significant deterrent to those who may wish to make a request under the law.

In summary the existing fee and cost structure has served the province well for the past thirty years and is in fact one of the areas where our law compares favourably with the provisions in other jurisdictions.

Some may favour a different or higher fee structure, or one charging an hourly rate for searches requiring more than a minimal amount of staff time. However these schemes generally seem to be advanced on the basis of a "money for value" argument or on a "cost-recovery" premise, neither of which should have any weight or bearing in forwarding the law's remedial purpose, which is to help us be governed more democratically by having a more informed citizenry. In our view there is no significant experience to suggest that New Brunswickers have abused the right to information by

filing frivolous complaints, or that the administration of the Act has become increasingly or overly costly. Even in the face of such criticisms from some quarters, we would urge the members of the Task Force to remain sanguine and consider that as with most other areas touching on the administration of our courts and legal processes, these costs are in every essential respect part of the cost of governing ourselves. They are the price of democracy and should be borne out of the Consolidated Revenue.

It is recommended that the existing fee and copying charge structure under the Right to Information Act be maintained.

Similarly, the Task Force members should resist calls to limit the number of access requests per individual per year. Such a blunt solution is not warranted on the basis of past experience in New Brunswick and is contrary to the Act's dominant purpose. It should be amply sufficient to provide merely that the Ombudsman, or an independent Commissioner, is master of his own process and has the necessary authority to establish internal rules of procedure and to guard against any possible abuse of process. This approach would be most consistent with the oversight agent's desired independence and impartiality.

Scope of the Act and Definitions

The scope of the current Right to Information Act is clearly deficient. The province routinely scores poorest of all Canadian provinces and territories in annual Freedom of Information surveys carried out by the Canadian Newspaper Association and this is primarily due to the fact that many public institutions surveyed across Canada are simply not subject to right to information laws in New Brunswick. Universities, police agencies, municipalities are subject to such legislation in virtually every other jurisdiction in Canada, but they are outside the scope of the current act in New Brunswick, and democracy here is the worse for it.

Taking again the UN principles as our comparator, the problem with the law in New Brunswick is not that the list of agencies covered by the act is under-inclusive, the problem is that you have to be named on the list, in order for the act to apply. I remain to be convinced that this is in fact the correct interpretation of the legislative provisions, but I have no doubt that this is how it is currently being applied. One case which graphically illustrates the point is my recent recommendation into the complaint of Debbie Thomas v. District Educational Council 14, NBRIOR-2006-21. In that case Ms. Thomas was seeking disclosure of hot lunch accounts tracking student council expenditures at a school in Centreville. The District had refused to disclose them, but submitted nonetheless to our review. After we recommended disclosure, the District offered to make the records available but formally objected to my jurisdiction. The District deferred to advice from the Attorney General that District Educational Councils, unlike their predecessor School Boards are not enumerated among the public bodies in the schedule to Regulations under the Right to Information Act and consequently, the Act did not apply. This was news to me and to most New Brunswickers, since the Act itself has specific exemptions with

respect to minutes of school board meetings, defines the term “school board”, since 1978 has always applied to school authorities, and recent cases involving the application of the Act by school authorities have recently been challenged successfully in our superior courts without anyone ever mentioning that the Act did not apply to District Educational Councils. However, the Attorney General is apparently now of the view that DEC’s are not public bodies.

This is typical of the confusion that can arise when the application of so foundational a piece of legislation is tied to a regulation-making authority that can limit the scope of the Act’s application. As a legislative model it would be difficult to conceive of an approach more ill-suited to the task of achieving transparency and accountability. The Act makes use of a drafting device that allows government to pay lip service to transparency and accountability while significantly reducing the scope of the Act by Order in Council. The *Protection of Personal Information Act* compounds this error by providing that it applies only to those public bodies that are subject to the *Right to Information Act*, or are otherwise expressly included by regulation.

The better approach is of course to define the term public body very broadly, as our Act does, but then provide that it applies to every public body except those specifically exempted by statute and then list the exempt authorities in the Act itself. In this manner the general rule becomes disclosure and the onus is placed upon the Executive to obtain legislative exemptions any time new public bodies are created with a view of shielding or exempting them from right to information or protection of personal information laws. This seems far more sensible than saying, for instance, that one third of the public service (ie school administration) is exempt from the law because the last time we altered the governance structure we forgot to amend a schedule to regulations under the *Right to Information Act*.

It is recommended that a new Informational and Privacy Rights Code for New Brunswick should have a very broad definition of “public body” or “department” so as to include all branches and levels of government including local government, elected bodies, statutory bodies, Crown corporations, tribunals and quasi-judicial bodies, police agencies and universities as well as intergovernmental agencies such as the Atlantic Lotteries Corporation. The Code should apply, as does the Quebec statute (section 3) to the legislative assembly and its officers and to administrative tribunals but not provincial courts or superior courts. It is further recommended that only bodies expressly exempted by statute and those excluded by statutory definition should be excluded from the reach of the Code.

Other aspects of the definitions under revised access laws need attention as well. It is critically important that the terms “document” or “information” be broadly defined. The current definition of document in the Act achieves this purpose, but is somewhat circuitous since information is defined as “information contained in a document” and document is defined as “any record of information”. It would be preferable to avoid this circular definition if it can be revised without diminishing the scope in any way. Here again reference to the UN’s first principle on “maximum disclosure” would be helpful.

Consideration should be given also to blending the terminology under revised access laws with the terminology of “record” and “public record” used in the *Archives Act*.

This ties in with the second UN principle which is the obligation to publish. Under this rubric consideration could be given to including in the Code a specific obligation on public bodies to publish, as a minimum, the following categories of information:

- Operational information on how the public body functions, including costs, objectives, audited accounts, standards and achievements
- Information on any requests, complaints or direct action taken by members of the public in relation to the public body;
- Guidance on processes by which the public may input on major policy proposals or legislative proposals;
- A record of the types of information held by the public body and the form in which it is held;
- A record of any decision or policy affecting the public and the reasons therefore.

This recommendation relates also to the recommendations outlined above concerning Routine access. Thus the informational rights process can be mapped out on a continuum of disclosure ranging from the essential informational rights which public bodies are duty-bound to publish; to those records which as a matter of routine are voluntarily published or disclosed without a formal access request; to those records which are not published, nor routinely disclosed, but to which any member of the public may nonetheless have access as of right; and, finally, to those exceptional records which for reasons of state, narrowly established by law, there is no right of access, but with respect to which there is nevertheless an administrative review process and judicial review process to ensure that non-disclosure serves the public interest.

In addition consideration should be given to including within a new Informational and Privacy Rights Code for New Brunswick the provisions of the *Archives Act* itself. In this manner all aspects of information management would be consolidated in one Code and an opportunity would be had to modernize the *Archives Act* and to address new aspects of information management which arise in the information age.

The definition of personal information also needs to be amended. The current definition was adopted when the *Protection of Personal Information Act* was proclaimed in 2001. It provides only that personal information is “information about an identifiable individual”. Identifiable individual is also a defined term and is broadly defined to mean anyone identifiable by the contents of information that contains a) the individual’s name or b) makes the individual’s identity obvious, or c) is likely to be combined with other information that could make the identity obvious. The result is that in New Brunswick we now have the most expansive protection of personal information of any Canadian province, and quite possibly any jurisdiction in the world.

Our courts have interpreted the law to mean that public bodies cannot release any document that identifies any person’s name, be they a member of the public or a public

official acting in their official capacity¹. Under this interpretation of the law, names, e-mail addresses, civic addresses, job titles, telephone numbers and any basic “tombstone” data is required to be severed from all records disclosed. The result is that the administration of the *Right to Information Act* has become very time-consuming and burdensome. Moreover, the extent of personal information severed may often render entire documents unseverable, or unreadable if disclosed as severed. Surprisingly, this is routinely done in the name of preserving the anonymity of public officials engaged in the exercise of their public office. This nonsensical application of the law bears no relation to the law elsewhere in Canada or around the world. At its root is a problem of definition.

The original definition under the *Right to Information Act* seemed too restrictive to the drafters of the *Protection of Personal Information Act*. A new definition was proposed and inserted into the *Right to Information Act*, the *Archives Act* and several other statutes regulating the management of personal information. The new definition was purposively vague and open-ended. It was expected that it would be applied purposively, in accordance with the interpretive principles outlined in PoPIA, and that any ambiguity would be resolved in favour of protecting privacy. This was all well-intentioned, but there is no denying six years later that courts and public officials have failed to be discriminating in the interpretation of this definition. The direct result is an unintended and significant reduction in transparency, openness and accountability in the public service. A new definition should be modeled more closely on the previous definition of personal information under the *Right to Information Act*, and on the laws of other provinces, such as British Columbia’s, which exempt contact information from the definition of personal information. Additionally, the definitional problem should be addressed by providing for a more explicit public interest override in cases where personal information exemptions are invoked. Sections 56 and 57 of the Quebec Act are good examples of a limiting provision in respect of personal information exemptions.

In addressing the significant problems to which the over-inclusive breadth of the personal information definition gives rise, the legislator should also be aware of the limitations which definitions elsewhere have been held to have, as being potentially under inclusive with respect to biometric data or unrecorded information. The recent submissions of the Canadian Privacy Commissioner’s Office with respect to amendments to the Canadian *Privacy Act* may be helpful in this respect.²

Finally, while still on the topic of definitions, the revised legislation should address concerns around the definition of “appropriate Minister”. The *Right to Information Act* makes the appropriate minister responsible for responses to right to Information requests, whereas the accountability principle under PoPIA tasks the “chief executive officer” of a public body with the administration of privacy protection principles. It would be preferable that the responsibility for each act be at the deputy head level in order to reduce the possibility of any political involvement in individual complaints regarding

¹ Hayes v. New Brunswick 2007 NBQB 047, February 5, 2007, Grant, J.; and Barnett v. New Brunswick 2006 NBQB 411, November 30, 2006 Riordon, J

² http://www.privcom.gc.ca/information/pub/pa_reform_060605_e.asp

informational rights or privacy rights. As I have recommended in the Graham and Vienneau complaints last fall, it is also necessary to consider amendments under PoPIA and the *Right to Information Act* and the *Archives Act* in order to specifically address the information management issues pertaining to ministerial correspondence and its archival treatment.

It is recommended that consideration be given to incorporating the provisions of the Archives Act into a new Informational and Privacy Rights Code for New Brunswick. It is also recommended that a new Code place specific obligations upon public authorities to publish as minimum, specified types of records.

Regarding legal definitions in the statute, it is recommended that the terminology with respect to “department” “authority” and “public body” and the terms referring to “document”, “information” and “record” currently in each statute be modified and used consistently. It is further recommended that the definition of personal information be modified to clarify its meaning and reduce the need to exempt information where the balancing of privacy interests and information rights favour disclosure. Finally it is recommended that the definition of appropriate minister be revised and that accountability for the administration of rights guaranteed under a new Code be placed with the deputy head or CEO of each public authority subject to the act, rather than with Ministers of the Crown themselves and that further study be carried out to determine how to treat Ministerial correspondence and similar records.

Duty to Assist

In many cases that have been the subject of reviews by this office, it has been clear that the need for any review could have been avoided and considerable time saved by public officials if the department concerned and the individual requester had communicated directly from the start to clarify the access request. Several provinces have in their legislation provisions similar to section 6 of the B.C. legislation which places an obligation upon public authorities to assist applicants and avoid technical interpretations of the access request with a view towards limiting disclosure.

It is recommended that new legislation in New Brunswick include an obligation upon public authorities to assist applicants with their Right to Information requests.

Exemptions to disclosure

As it was one of the first Freedom of Information laws adopted in Canada and one which has not undergone major reform since 1978, our *Right to Information Act* remains relatively bare-boned. This is one of its great strengths. I believe it is essential, in order to better balance informational and privacy rights, in order to better harmonize our laws with that of other provinces, and in order to clarify the law, that we now unify and blend these laws into a single Code. However it will be very difficult in doing so to resist the urge and the pressure from various parts to add new exemptions. A quick scan through the exempting provisions of other statutes in Canada confirms me in the view that we must tread cautiously when we propose modeling our law to closely on any of our sister

provinces. The *Right to Information Act* exemptions in New Brunswick have been refined through thirty years of interpretation by our courts. They are by and large comparable with the exemptions in other statutes, if somewhat more succinct, and they have served us well. It would be a disservice to New Brunswickers to make any substantial changes in terms of the enumeration of exempting provisions at this time. The trend in the jurisprudence has been towards a narrowing of the scope of exemptions, particularly in terms of opinions and recommendations to Cabinet and interference with contractual rights of Third Parties. Any move away from this jurisprudence would give New Brunswickers lesser access rights than their compatriots elsewhere and would set a dangerous precedent for other jurisdictions.

In one area, hospital boards, school boards and community boards were successful at one time in lobbying for amendments to the Act to include specific exemptions with respect to policy documents and committee minutes regarding board deliberations and advice with respect to such. The effect is such that these boards now enjoy more privilege and less scrutiny than do Minister of the Crown with respect to advice received from officials. It would be preferable for these provisions to be repealed and that the opinion and recommendation exemption for cabinet or a Minister, be properly limited to public policy deliberations at that level. Cabinet secrecy is an important democratic principle. I see no overriding public policy interest in keeping the public in the dark about the policy-making function and deliberations of hospital boards, community boards and school authorities.

It is recommended that the list of existing exemptions under the *Right to Information Act* be carried over into a new *Information and Privacy Rights Code* with the exception of paragraph 6. f.3). It is further recommended that no new exemptions be added to the Code at this time, except where minimally necessary to address the expanded scope of the Code as it may apply to universities, municipalities or other such public authorities for the first time.

The makers of our constitution undertook to secure conditions favorable to the pursuit of happiness... They sought to protect [citizens] in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone – the most comprehensive of the rights and the right most valued by civilized men.

Louis Brandeis, U.S. Supreme Court Justice

From that point on, the extraordinary system of spies and informers which has played an important part in the political work of the French state into our own time took shape. (Sartine, who became lieutenant general de police in 1759, is supposed to have said to Louis XV, "Sire, when three people are chatting in the street one of them is surely my man.")

Charles Tilly, French Philosopher

Part III – Privacy Rights

The *Protection of Personal Information Act* is not so much about privacy, as it is about data protection. Unfortunately it is held out to be much more. Almost every other Canadian jurisdiction has a Privacy Commissioner's Office. I will have the pleasure of hosting their annual meeting at month's end. The fact is however that all these privacy commissioners, aside from their advisory or educational mandates are basically tasked to act as data commissioners. New Brunswickers generally believe that if their privacy is violated in any significant way, the law will protect them. However, the fact is, that New Brunswickers like most Canadians enjoy generally lesser legal protections in the area of privacy, than most American or European citizens. This is so for a number of reasons.

Under our *Charter of Rights* we have no express privacy rights guaranteed, only a protection against unreasonable search and seizure. At common law Canadian courts, like British and Australian courts have been slow to recognize any actionable tort for invasion of privacy, which is why many Canadian provinces have adopted laws creating a statutory tort for invasion of privacy. In New Brunswick, a bill introducing a similar law was tabled by government in the 2000 spring session, but the bill died on the order paper following significant media opposition.

International Human Rights Conventions, binding upon the province and Canada compel signatory states to take measures to effectively guarantee the right to privacy. The 1948 Universal Declaration of Human Rights, drafted by John Peters Humphrey, a native of Hampton New Brunswick, provides that:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to attacks on his honour and reputation. Every one has the right to the protection of the law against such interference or attacks.

Twenty years later when Canada's prominent Justice Minister repealed the Criminal Code's anti-sodomy laws and was applauded for stating that "the State has no business in

the bedrooms of the nation”, Canadians grasped immediately the liberty and privacy interests being defended in those reforms. Yet fifteen years later when Prime Minister Trudeau repatriated the constitution with a new *Charter of Rights and Freedoms* the text was strangely silent on the topic of the right to privacy. In 1983 the Privacy Act was introduced federally replacing provisions of the *Canadian Human Rights Act* and consolidating the trend towards data protection legislation as opposed to guaranteeing a right to privacy. Today in Canada when our courts and legislators grapple with issues of abortion rights, gay marriage right, single parent adoption rights, disability assistance rates, we tend invariably to analyse every issue through the prism of non-discrimination and equality rights. We are recognized around the world for our leadership in understanding and defining equality. Unfortunately, when it comes to understanding notions of liberty and fraternity, and using these filters to gauge our laws and social policy, we come up short.

The one notable exception in Canada in the area of privacy rights has been Quebec. Unlike Canada’s common law jurisdictions, the latest revisions to Quebec’s *Civil Code* place renewed importance on long held civil rights of privacy and solitude. The Quebec *Charter of Human Rights and Freedoms* squarely proclaims a right to privacy in section 5 and further defines the scope of that right in guarantees set out in sections 4 through 9. These provisions provide as follows:

Safeguard of dignity.

4. Every person has a right to the safeguard of his dignity, honour and reputation.

Respect for private life.

5. Every person has a right to respect for his private life.

Peaceful enjoyment of property.

6. Every person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law.

Home inviolable.

7. A person's home is inviolable.

Respect for private property.

8. No one may enter upon the property of another or take anything therefrom without his express or implied consent.

Right to secrecy.

9. Every person has a right to non-disclosure of confidential information.

Disclosure of confidential information.

No person bound to professional secrecy by law and no priest or other minister of religion may, even in judicial proceedings, disclose confidential information revealed to him by reason of his position or profession, unless he is authorized to do so by the person who confided such information to him or by an express provision of law.

Duty of tribunal.

The tribunal must, ex officio, ensure that professional secrecy is respected.

Quebec was also the first Canadian province to include in its access to information law, significant provisions with respect to the protection of personal information and was the first jurisdiction in North America to extend its data protection law to the private sector. It is not surprising therefore that Canadian opinion surveys have often noted a greater level of confidence among Quebecers with respect to their right to privacy and a lesser tendency to rate privacy issues among their most pressing concerns, as compared to other Canadians.

I believe, the enumeration of fundamental rights excerpted above from the Quebec Charter also reflects the legitimate expectations of privacy held by New Brunswickers. Until the law in this province recognizes the foundational nature of this right to privacy New Brunswickers will continue to consider the law deficient and ineffective. Past Canadian Privacy Commissioners have regularly called for constitutional amendments entrenching a strengthened right to privacy in our Supreme Law. Given the complexity of the Charter's amending formula however, it is unlikely that such additional protections will be entrenched in our constitution any time soon. Consequently the most effective and efficient means of adequately protecting the right to privacy in New Brunswick is to affirm these rights in an Information and Privacy Rights Code that will be afforded a quasi-constitutional status by our courts.

It is recommended that a new Information and Privacy Rights Code for New Brunswick affirm at the outset of its chapter on Privacy rights the various elements of the right to privacy modeled on the provisions of section 4 to 9 of the Quebec Charter of human rights. It is further recommended that consideration be given to having these rights come into effect immediately upon proclamation in respect of the public sector and that the provisions take effect at a later date in respect of the private sector.

Protection of personal information

New Brunswick's *Protection of Personal Information Act* is distinctive in that it does not attempt to foresee every eventual privacy breach and provide a rule for that eventuality. Indeed, it merely affirms ten privacy principles and gives them force of law. It also provides an interpretive guide as to how to apply the principles. In my view great advances will be achieved by blending both access and privacy laws into one Code and affirming the basic information and privacy rights within the Code. Public Officials will greatly benefit also from adequate training and by the additional clarity that may come from blending the interpretive guidelines in schedule B of PoPIA with the statutory principles themselves. Beyond that I would not recommend that significant changes be made at this time, to the privacy principles and interpretive guidelines developed under PoPIA. These guidelines are increasingly recognized as a universal standard and there is no great benefit to be gained in seeking to modify or "improve" upon the formulation they have been given. The challenges in applying the law and making sense of the principles in practice are a question of training and work culture.

What is critical however is to insist in the statute that information and privacy rights must be applied with a balanced approach carefully weighing the public interest in disclosure

against a private interest in non-disclosure. Additionally the task force should consider a number of amendments to bring the Information and Privacy Rights Code into line with legislative developments elsewhere. Beyond the assertion of the 10 privacy principles which are largely universal, the Code would benefit from the addition of sector specific provisions.

For instance, in the area of E-government, provisions could be added that more narrowly circumscribe the manner in which government can be shared between governments and among government agencies in the era of on-line government services. New Brunswick should also look to the legislative models in British Columbia and Nova Scotia that govern transborder data-flows in order to ensure that in a transnational business environment the privacy rights that New Brunswickers enjoy are not unduly compromised, for instance by legislative reporting requirements elsewhere. Other privacy statutes also now include in public sector statutes detailed provisions governing privacy protection in a context of outsourced government services. It has frequently been noted that in the absence of such safeguards, public agencies may seek to avoid privacy safeguard requirements by devolving service delivery upon private sector operators. Specific provisions to guard against such practices are increasingly the norm and should be included in a New Brunswick Information and Privacy Rights Code.

Furthermore, in my view the Task Force should also adopt for our purposes here the recommendations of the Canadian Privacy Commissioner's office in its 2006 review of the *Privacy Act* to solidify the applicable legislative provisions in the area of data-matching and data-mining safeguards for public bodies. Most privacy rights laws now include provisions in the area of breach notification. This has become a very significant trend of law reform in the United States and Canadian jurisdictions are now following suit. While it is particularly helpful to have such breach notification provisions apply to the private sector, until such time as New Brunswick adopts substantially similar legislation to govern the private sector here it is recommended that public bodies be subject to new and specific breach notification duties. Finally, several Canadian statutes provide for the establishment of personal information banks (e.g. sections 44- 46 of the Ontario statute) and publication of the types of information they contain. Similar provisions should be added to the New Brunswick Code.

It is recommended that the protection of personal information provisions in a new Information and Privacy Rights Code be modeled upon a combination of existing schedules A and B under POPIA and that the Code also subject all the rights guaranteed therein to a public interest test that requires the balancing of information and privacy rights at stake. Beyond that it is recommended that the amendments or the new legislation interfere as little as possible with the formulation of privacy principles and interpretive guidelines set out in PoPIA. At the same time it is recommended that the Act be strengthened with the addition of new provisions to make the Code current with best legislative practices elsewhere in the areas of outsourcing, information sharing between and within governments, trans-border data-flows, data-matching and data-mining, disclosure notification procedures and

publication of lists of personal information banks, including the nature of information contained therein.

Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.

John Stuart Mill, British Philosopher and Parliamentarian

Liberty is the prevention of control by others. This requires self-control and, therefore, religious and spiritual influences; education, knowledge, well-being

Lord Acton, British Historian

Part IV - Application and Enforcement

As stated above the most critical piece of any reform the Task Force may recommend will undoubtedly be with respect the training and resources that are committed by government to give effect to the law, whatever formulation it may take. The rights New Brunswickers seek to have protected will only be enjoyed optimally if and when individual citizens are informed of their rights and have ready means of having them addressed and determined. Regrettably these are the aspects of both the *Right to Information Act*, and particularly under PoPIA, that are most inadequate.

An independent Commissioner

Most Canadian jurisdictions have an independent Commissioner tasked with oversight of the ATIPP or FOIPP laws in that province. The Commissioner is usually an Officer of the Legislature and may have order making power or operate on an Ombudsman model with only a power of recommendation. At this stage in New Brunswick, it would be most consistent with the adoption of an Information and Privacy Rights Code to appoint an independent Commissioner as the Legislative Officer responsible for the Code's oversight. While Manitoba and the Yukon also share the Commissioner's function with the provincial Ombudsman, neither of those offices have the additional mandates which the New Brunswick Ombudsman now has as Child and Youth Advocate and Civil Service Commissioner. Moreover both those offices have dedicated staff positions dealing full-time with access and Privacy issues. The Manitoba Ombudsman has a staff complement of 29 employees of whom 11 work full-time in the Access and Privacy division. Neighbouring provinces of Newfoundland and Nova Scotia, and also Prince Edward Island have independent Commissioners tasked with the legislative oversight of their Access & Privacy laws.

In order to ensure the independence and institutional authority required of this legislative Office it is recommended that the Commissioner's appointment provisions be modeled upon the recently adopted amendments to the Ombudsman Act. That is to say that the

Commissioner should be appointed to a non-renewable ten year term upon motion of the Legislative Assembly and be removable for cause only upon address by a two third majority vote of the Assembly's members. It is further recommended that given the Commissioner's oversight functions as an officer responsible for the adjudication of claims under the Code including the granting of broad remedial orders outlined below and the review of claims of privilege including solicitor client privilege, it is recommended the criteria for appointment as Commissioner include minimally those criteria applicable for appointment to the bench, including the Commissioner's good standing as a member of the Law Society of New Brunswick for a period of more than ten years.

It is recommended that the new legislation establish an independent Information and Privacy Commissioner as a distinct legislative Officer's position with appointment provisions and guarantees of independence modeled in part on the recently amended provisions of the *Ombudsman Act* and providing also that the Commissioner must have been a member in good standing with the Law Society of New Brunswick, or equivalent provincial bar association, for a period of over ten years.

A Broadened Mandate

Comparing ourselves again to other jurisdictions the Ombudsman Office in New Brunswick is ill-equipped both in terms of resources and mandate to carry out functions comparable with our counterparts in other parts of the country. There is a great deal of work to be done in this province in order to groom our public and private sectors into the privacy practices that will enable us as a society to compete effectively in an increasingly global and on-line trade environment. Primarily this work is in the areas of training, promotion, education, monitoring and auditing. In areas of Public Education and research and education it is essential to task a separate government department with the task of enforcement and training all government agencies in the application of the new Code. However an independent Privacy Commissioner or the Ombudsman could continue to assist in this effort of internal training and capacity building, while focusing primarily on the public education and promotion piece. The Code should provide the oversight body with a broad public research and education mandate to i) conduct relevant research into privacy issues; ii) educate the public with respect to their rights and information and privacy rights issues; iii) evaluate privacy and information impacts of proposed legislation and programs; and iv) make reports to the Assembly as required into such matters as required in the interest of the better administration of the Code. Consideration could be given in preparing such legislative provisions to the models in section 13 of the New Zealand *Privacy Act*, 1993 and those in section 27 of the Australia *Privacy Act*, 1988.

Most other Canadian Information and Privacy Commissioners monitor privacy and security technology developments in order to adjust privacy practices and recommendations as appropriate. They also intervene in court cases where their decisions are challenged and in matters where their intervention may assist the courts. They offer mediation services to assist petitioners and public authorities to resolve their access and

privacy disputes. They may recommend public prosecution of offences under the Code, or applicable ATIPP laws. In jurisdictions where specific health information privacy laws are in place Commissioners often have order making powers to approve or correct information management plans filed by health information custodians.

It is recommended that a new Information and Privacy Commissioner's Office should have a broad mandate including authority to conduct audits and investigations of public authorities on his own motion, authority to report to the Legislative Assembly and advise government in privacy and information rights matters, authority to conduct research and issue reports, authority to review and comment on bills and legislative proposals before the Assembly that may have information or privacy impacts, authority to mediate information and privacy disputes and to intervene before the courts in appropriate cases, and also a broad mandate to promote Information and Privacy Rights and to inform the public with respect to such matters.

Adequate Resources

It is recommended that the Privacy Commissioner be established with sufficient resources to allow the Commissioner to carry out a broadened mandate. In my last annual report I drew attention to the fact that the New Brunswick Ombudsman's Office was the least adequately resourced oversight body of any Canadian privacy and access Commissioner's office. Last spring, I was pleased to note that government approved a requested \$100,000 increase in our operational budget to hire additional staff in relation to this mandate. Unfortunately the fact remains that even with this increase, our per capita spending as a province in this area still leaves us at the bottom of the barrel in terms of inter-provincial comparisons. Even if the Ombudsman's budget in respect of this mandate were doubled again our per capita spending would still not place us in the middle of the pack, as compared to other provinces or territories. Having regard to the scope of reform needed, and the level of resources invested in other provinces such as Newfoundland, Saskatchewan and Manitoba, it is recommended that the Privacy Commissioner's Office in New Brunswick be established with sufficient resources to allow for the hire of the Commissioner, in-house counsel, an intake officer, a policy and educational officer investigators for each of the access, privacy and personal health information files and two administrative support positions. The personal health information officer's position and a second administrative support position could be phased in to the plan of establishment as the personal health information provisions neared proclamation.

In the event that the Ombudsman should continue to be responsible for the administration of an *Information and Privacy Rights Code*, it is submitted that similar additional resources will be required to properly administer a broadened mandate. Some administrative efficiency may be realized in terms of office overheads and reducing staff requirements at the level of administrative support and screening functions. However, while the reporting function under this model would continue to be to the Legislature through the Ombudsman, operationally, the branch should be administered through a deputy or assistant Ombudsman. In either case it is critical that additional resources be allocated to the oversight body in order to allow it to properly carry out its mandate.

It is recommended that an independent Commissioner's office must be adequately resourced and allow initially for a staff complement of 7 employees, including the Commissioner, in order to effectively carry out the revised mandate under the Code.

A Central Government Authority to Administer the Code

More critical than the attribution of adequate resources to the Legislative oversight body is the creation of a proper central authority responsible for the administration of an *Information and Privacy Rights Code*. In other provinces the provincial (Access to Information and Protection of Privacy) ATIPP office has a staff of 3 to 10 or more employees working full-time with public bodies. They ensure that their information management practices are in line with the law. They advise and assist in the processing and mediation of information requests and privacy complaints. They develop routine access policies and privacy policies. They advise on how to carry out privacy audits and privacy impact assessments, and they train staff throughout the civil service on how to administer the legislation. Currently in New Brunswick the Executive Council Office has legislative responsibility for both PoPIA and the *Right to Information Act*, and all the functions described above fall to one staff person, who can only devote 20 percent of the time to these matters as a result of other job responsibilities. In Newfoundland and Labrador the ATIPP office now employs 10 people full-time even though the privacy provisions in the province's law are not yet proclaimed.

The Code must also determine which department of government should be tasked with the administration of this Act. The Executive Council Office is a small office which operates very much in lock-step with the prevailing political direction, rather than in accordance with its own operational mandate. It is easy in this context for matters such as Access to Information and Protection of Personal Information to take a back seat to other pressing issues. In several other provinces ATIPP offices answer to the Attorney General. This also has merit. A further possibility is to house responsibility for the Act with the Provincial Archivist or the Chief Information Officer. Both these officers are by professional training and in practical experience professional data stewards. In recent recommendations and investigations under PoPIA, I have had occasion to remark upon the professionalism and independence of officials involved in the field of information management in this province. This option may require further study in order to ensure that the Archivist or CIO has enough authority throughout the administration of the Public service to ensure the cooperation and compliance of other departments and their deputies. However, in my view, as long as government is committed to provide adequate resources to the ATIPP office, the province and the public have everything to gain by placing the administration of the Code squarely within the hands and purview of professional data stewards.

It is recommended that the Code establish a central ATIPP office responsible for the general administration of the Code. It is further recommended that this office must be adequately staffed, particularly over the short term, to ensure the training and education necessary to bring about a culture change in the civil service. It is

recommended that consideration be given to housing the ATIPP function with the Provincial Archivist or Chief Information Officer for the province.

The complaint and review process

In combining the statutes into one Code the law should provide nonetheless for separate procedures in respect of complaint investigations and audit functions in privacy matters and right to information reviews per se. The appropriate enforcement mechanism could be listed along with the substantive rights in each section of the code (foundational rights, access and information rights, public sector privacy rights, health information rights, private sector privacy rights, etc.), or listed as an array of remedies set out in the enforcement provisions of the Code and attached to one or more categories of rights. Overall it is recommended that the Code will improve the law by providing for a broad array of remedies. In every case, the Code should provide for informal and formal hearing processes into complaints requiring investigation. Early mediation of complaints should be promoted at all levels. The Commissioner should have broad discretion to accept or refuse jurisdiction to investigate on grounds similar to those under the *Ombudsman Act*. The investigative powers of the Commissioner should be similarly broad as those of the Ombudsman and modeled after that Act, but modified in accordance with the Commissioner's proposed order-making power. In particular it is recommended that the Code distinguish further between the informal investigation and mediation process and a formal investigation process leading to a hearing before the Commissioner. It is also recommended that the Commissioner have the power to proceed with a complaint investigation on his own motion.

It is submitted that the administration of the law could be improved by facilitating on-line applications of right to information requests. Having guidelines and models or samples of access to information requests on-line may be of assistance but the use of standardized forms should be avoided as it entails needless regulation, and may actually diminish access rights. It is much more important to emphasize, under the Code, the duty to assist recommended above and to continue to treat all complainants and requesters on an equal footing. There is no merit, in our view to treat media or opposition requests, or those from lawyers any differently from requests from members of the general public. Finally transferring requests to the appropriate Minister is supposed to occur in every case, as the law in New Brunswick is consistent with most every other jurisdiction in Canada. If this is not occurring at present the law needs to be better enforced, and should perhaps be clarified, but there is no need to extend the deadlines for responding to a request in order to facilitate this.

It is recommended that the Information and Privacy Rights Code include a broad array of enforcement mechanisms and that these provisions be tailored to the substantive information and privacy rights outlined in the Code. The Commissioner's investigative powers should be modeled after those of the *Ombudsman Act* and modified in keeping with the Commissioner's oversight functions in respect of claims of solicitor client privilege and other remedial authority recommended below. It is recommended that early mediation of disputes

be encouraged at all levels and that the Commissioner have authority to conduct investigations on his or her own motion.

The audit function

One of the critical areas where the law in New Brunswick could be improved is through the introduction of specific audit functions and authority on the part of the oversight body tasked with the administration of the Act. Personal Health Information privacy laws rely heavily on this enforcement mechanism but other FOIP laws rely on such mechanisms as well, particularly on the privacy side. This work is at times more labour intensive than complaint review mechanisms but in the area of privacy, is more likely to yield good enforcement and good privacy practices on the part of administrators. Privacy is something you can often not define until it is lost. And even when privacy is impacted or infringed, many citizens cannot be troubled to bother pursuing the infringement, even though they may regret it or be troubled by it. In this way, poor privacy practices creep into our work methods and go unchallenged, until our liberty and freedoms are materially affected. Audit functions protect privacy and liberty by ensuring that adequate safeguards are in place at appropriate levels, before a breach can occur. The Commissioner's audit powers should be also be available upon request of a public body or on the Commissioner's own motion.

It is recommended that the Commissioner have broadly defined audit powers, including the right to conduct audits on his or her own motion.

Order making power & Remedies

In order to facilitate the administration of the law and bring clarity and certainty to a field of law that is rapidly evolving, it is recommended that the Commissioner be given order making powers, subject to a statutory right of appeal. It is particularly true in matters of information rights that information delayed is information denied. Too often under the existing *Right to Information Act*, Ombudsman recommendations go unanswered for months upon months. There are often also undue delays by Ministers in responding to the initial access request. Moving away from the Ombudsman model and towards the order-making model would bring closure more rapidly in many cases and would also help consolidate and clarify the law. This is the model that is preferred in the provincial jurisdictions where the ATIPP laws are most developed (B.C., Alberta, Ontario and Quebec.) This should be so both with respect to allegations of privacy rights violations and complaint investigations and with respect to access request reviews. The option of filing an access request in court of Queen's Bench should be repealed, in the event that the Commissioner is granted order-making powers.

In the case of an alleged violation of the informational or privacy rights protected under the Code the Commissioner should have broad remedial order making powers comparable to that of a Board of Inquiry under the Human Rights Code. Our courts have always maintained that strong rights deserve strong remedies. It is for that reason that our superior courts are given unprecedented authority under section 24 and 52 of the Canadian Charter to craft appropriate remedies in the case of a violation of any of the fundamental human rights protected by our Charter. Taking privacy and information

rights seriously means putting some real teeth into the Code in terms of remedies. In democratic societies the civil law provides restitution remedies where harm is done to a person. A breach of a person's privacy is harmful and it is recommended that the Commissioner should have sufficient remedial powers in appropriate cases to make a person whole for the loss they may have suffered as a result of a breach of their privacy.

It is recommended that the Information and Privacy Rights Code grant broad remedial powers, including the right to order restitution, to the Commissioner in the case of a demonstrated violation of any of the rights guaranteed under the Code

Time-limits

The maintenance of strict time-limits for responding to access requests is one of the chief benefits of our current legislative regime and it should be maintained in the interest of giving effect to the legislative purpose. While it is often not possible to meet the legislative standard in terms of response times to access requests, the experience of other provinces shows that the compliance rate does not necessarily improve when deadlines are lengthened or when a provision is added to allow for their extension. Keeping strict timelines on the books as a statutory requirement brings rigour and priority to the task which is consistent with the nature of the right protected.

In the event that the recommendation herein to grant the Commissioner order-making power were not retained, it would be important to add a provision to the Code outlining the maximum time period that a public authority should be afforded to respond to an Ombudsman recommendation. An additional 30 day period would be appropriate for that type of decision.

It is recommended that the time-limits established under the *Right to Information Act* be carried over without substantial modification into a new *Information and Privacy Rights Code*.

Mediation

The Code should outline a complaint resolution process between investigation and hearing that requires the parties to proceed to mediation. IN other words the Commissioner should have authority to make binding orders with respect to violations of information and privacy rights determined under the Code, but only after mediation efforts have been exhausted. Most other Commissioners in Canada address and resolve the lion's share of their case-load through mediation. Access and Privacy rights in New Brunswick would be greatly advantaged by this approach. Mediation leads to a better understanding and application of the law in most cases. It most often results in a win-win solution, as opposed to exacerbating what might be conceived as a win-lose approach. It is also usually timelier. The lack of any formal mediation process for access requests and privacy complaints, at any stage in New Brunswick is a serious flaw in our legislation.

It is recommended that the privileged form of dispute resolution for any of the rights guaranteed under the *Information and Privacy Rights Code* be mediation and that the Commissioner be mandated to conduct formal hearings only into

complaints where mediation attempts have been made and have failed to completely resolve the issues.

Notification of third parties

One of the most significant shortcomings of the current *Right to Information Act* is the failure to require notification of Third Parties. In fairness, a proper interpretation and application of the Act would suggest that absent notification and compelling evidence of harm to third parties a Minister should fail to meet the onus placed upon him or her of proving the exemption invoked. Nonetheless a more lax practice and interpretation has been in place in the province for many years. The result is that public officials often invoke exemptions made for the benefits of third parties on the basis of the Minister's own appreciation of the likelihood of harm without any notification, evidence or manner of proof of the third parties position in the matter. The appropriate way of addressing this issue is to modify the provisions to include a clear obligation to notify as exists in most other provinces.

It is recommended that the onus of proving exemptions to the information rights guaranteed by the Code be squarely placed upon the Minister invoking the exemption and that any exemptions that inure to the benefit of third parties must be advanced upon satisfactory proof to the third parties' overriding interest after consideration of the public interest issues at stake.

Appeals

As noted above the Commissioner's order-making powers should be subject to a limited right of appeal on a point of law, but not as a trial de novo. Such appeals should be heard in the Court of Queen's Bench. A Queen's Bench judge should expressly be able to refer the matter on to the Court of Appeal in the interest of expediency.

It is recommended that the Commissioner's order-making powers should be subject to a limited right of appeal on a point of law.

Offenses & Penalty provisions

In keeping with the call for a broad array of enforcement mechanisms recommended above it is recommended that the Code should carry over the existing penalty provisions from the *Protection of Personal Information Act* and that these should be updated through comparison with provisions of statutes in other Canadian jurisdictions. In particular it may be helpful to explore specific provisions establishing offences dealing with the destruction of personal information records in particular and public records generally. Further study in the area of penalty provisions for the misuse or improper appropriation of personality or personal information of young persons, particularly in light of the rapid rise in use of social networking sites, should also be given urgent consideration by government.

It is recommended that the Code contain adequate penalty provisions and that consideration be given to the establishment of particular penalty provisions for

instance in relation to the destruction of records and the misuse of personal information in relation to young persons.

Part V – Private sector legislation

Perhaps the single most important issue in the area of information and privacy rights in New Brunswick today is the lack of any appropriate legislative framework to provide any administrative or effective remedy for privacy violations that occur within New Brunswick workplaces. Federally regulated workplaces are subject to the Privacy Act or PIPEDA, but that accounts for only 15% or so of all workplaces within the province. Most employers are therefore held to a much higher standard of care with respect to the privacy of their customers than with respect to the privacy of their own employees. New Brunswickers often don't realize that this gap in the law is as wide as it is. They are invariably disillusioned when they learn that this is the case.

For this reason it is disconcerting that the Consultation Paper distributed by the task Force remains silent on this most significant legislative gap. At its root, this issue raises the question of whether the federal government is appropriately authorized to legislate with respect to privacy rights in New Brunswick under the Federal Trade and Commerce Power, or indeed whether it falls to the Province to do so as a matter interesting Property and Civil Rights within the province. In our view information and privacy rights are much more clearly a matter of provincial legislative authority and it should be only a matter of time before New Brunswick and every other province in Confederation adopt "substantially similar" legislation to PIPEDA.

The problem is that New Brunswick businesses and workplaces are even less well-equipped today to adopt meaningful information and privacy rights practices than are our public sector bodies, and many public sector bodies, including municipalities, their police authorities and universities have never themselves been subject to these laws. In this context it is appropriate to learn to walk before we run.

It is recommended that the Code should apply to the provincially regulated private sector as well but these provisions could be drafted and circulated for public consultation separately and proclaimed at a later date. Alternatively the matter could be placed on the agenda of a five year review of the Code.

The things most people want to know about are usually none of their business.
George Bernard Shaw, British Playwright

I never hurt nobody but myself and that's nobody's business but my own.
Billie Holliday, American songstress

Why doesn't everybody leave everybody else the hell alone?
Jimmy Durante, Jazz musician & Hollywood Actor

Part VI – Conclusion

In the foregoing pages I have attempted to respond to the various issues raised by the Task Force in its consultation paper. At the same time I have attempted to outline a vision for a meaningful and robust approach to the administration of privacy and information rights in this province. Forty years ago when the Office of the Ombudsman was created, this province stood at the vanguard of Canadian provinces in the area of accountability and good governance. Ten years later the Province was again an early adopter of best practices in the area of accountability and open government as it was the second jurisdiction in Canada to adopt a *Right to Information Act*.

Regrettably, from such beginnings, the Province has done too little and rested on these faded laurels too long. The result is that New Brunswickers have fallen far behind the rest of the country with respect to the protection of personal information and access to information rights. It has become abundantly clear to me over the past several years and particularly as host of this year's annual meeting of Canadian Information and Privacy Commissioners that the gulf in enforcement and administrative and legal guarantees in this area between our province and nearly every other Canadian jurisdiction has grown deep and wide. Substantial and concrete measures are required to make up for the lost time and ground.

On the one hand I believe that the recommendations contained herein, particularly as they touch on matters of resources and training and administration of the law constitute a bare minimum of investment that is urgently needed to do justice to this important aspect of the Ombudsman's current mandate. At the same time, I have attempted to cast these recommendations in the context of a more thorough-going reform, and have brought forward recommendations for a new context for information and privacy rights protection, one which recognizes the fundamental nature and importance of the rights at stake. I firmly believe that by endorsing these recommendations the task force would be placing New Brunswick at the forefront of information and privacy rights protection in Canada and following closely the lead taken by the province of Quebec as a sector leader in this area of good governance and democratic rule.

There is an opportunity here, for the same level of financial investment to do the job right. Rather than merely play catch-up with other provinces, the Government should sow the seeds of law reform for a new generation of information and privacy rights protection

that may serve as a model to other Canadians and for democratic societies elsewhere. This, I believe, is the level of privacy protection and accountability that New Brunswickers now expect of their government. By proceeding with these reforms the government would be building towards its ambitious goals of self-sufficiency, by establishing benchmarks of good governance that are commensurate with the transformational change it has heralded in all sectors of the economy and civil society.

Annex II

THE PUBLIC'S RIGHT TO KNOW: PRINCIPLES ON FREEDOM OF INFORMATION LEGISLATION June 1999

Principle 1. Maximum disclosure

Freedom of information legislation should be guided by the principle of maximum disclosure.

The principle of maximum disclosure establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances (see principle 4). This principle encapsulates the basic rationale underlying the very concept of freedom of information and ideally it should be provided for in the Constitution to make it clear that access to official information is a basic right. The overriding goal of legislation should be to implement maximum disclosure in practice.

Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information. Everyone present in the territory of the country should benefit from this right. The exercise of this right should not require individuals to demonstrate a specific interest in the information. Where a public authority seeks to deny access to information, it should bear the onus of justifying the refusal at each stage of the proceedings.

In other words, the public authority must show that the information which it wishes to withhold comes within the scope of the limited regime of exceptions, as detailed below.

Definitions

Both "information" and "public bodies" should be defined broadly. Information includes all records held by a public body, regardless of the form in which the information is stored (document, tape, electronic recording and so on), its source (whether it was produced by the public body or some other body) and the date of production. The legislation should also apply to records which have been classified, subjecting them to the same test as all other records.

For purposes of disclosure of information, the definition of public body should focus on the type of service provided rather than on formal designations. To this end, it should include all branches and levels of Government, including local government, elected bodies, bodies which operate under a statutory mandate, nationalized industries and public corporations, non-departmental bodies or "quangos" (quasi non-governmental organizations), judicial bodies and private bodies which carry out public functions (such as maintaining roads or operating rail lines). Private bodies themselves should also be included if they hold information whose disclosure is likely to diminish the risk of harm

to key public interests, such as the environment and health. Intergovernmental organizations should also be subject to freedom of information regimes based on the principles set down in this document.

Destruction of records

To protect the integrity and availability of records, the law should provide that obstruction of access to, or the wilful destruction of records is a criminal offence. The law should also establish minimum standards regarding the maintenance and preservation of records by public bodies. Such bodies should be required to allocate sufficient resources and attention to ensuring that public record-keeping is adequate. In addition, to prevent any attempt to doctor or otherwise alter records, the obligation to disclose should apply to records themselves and not just the information they contain.

Principle 2. Obligation to publish

Public bodies should be under an obligation to publish key information.

Freedom of information implies not only that public bodies accede to requests for information but also that they publish and disseminate widely documents of significant public interest, subject only to reasonable limits based on resources and capacity. Which information should be published will depend on the public body concerned. The law should establish both a general obligation to publish and key categories of information that must be published.

Public bodies should, as a minimum, be under an obligation to publish the following categories of information:

- Operational information about how the public body functions, including costs, objectives, audited accounts, standards, achievements and so on, particularly where the body provides direct services to the public;
- Information on any requests, complaints or other direct actions which members of the public may take in relation to the public body;
- Guidance on processes by which members of the public may provide input into major policy or legislative proposals;
- The types of information which the body holds and the form in which this information is held; and
- The content of any decision or policy affecting the public, along with reasons for the decision and background material of importance in framing the decision.

Principle 3. Promotion of open government

Public bodies must actively promote open government.

Informing the public of their rights and promoting a culture of openness within Government are essential if the goals of freedom of information legislation are to be realized. Indeed, experience in various countries shows that a recalcitrant civil service can undermine even the most progressive legislation. Promotional activities are, therefore, an essential component of a freedom of information regime. This is an area where the particular activities will vary from country to country, depending on factors such as the way the civil service is organized, key constraints to the free disclosure of

information, literacy levels and the degree of awareness of the general public. The law should require that adequate resources and attention are devoted to the question of promoting the goals of the legislation.

Public education

As a minimum, the law should make provision for public education and the dissemination of information regarding the right to access information, the scope of information which is available and the manner in which such rights may be exercised. In countries where newspaper distribution or literacy levels are low, the broadcast media are a particularly important vehicle for such dissemination and education. Creative alternatives, such as town meetings or mobile film units, should be explored. Ideally, such activities should be undertaken both by individual public bodies and a specially designated and adequately funded official body – either the one which reviews requests for information, or another body established specifically for this purpose.

Tackling the culture of official secrecy

The law should provide for a number of mechanisms to address the problem of a culture of secrecy within Government. These should include a requirement that public bodies provide freedom of information training for their employees. Such training should address the importance and scope of freedom of information, procedural mechanisms for accessing information, how to maintain and access records efficiently, the scope of whistle-blower protection, and what sort of information a body is required to publish. The official body responsible for public education should also play a role in promoting openness within Government. Initiatives might include incentives for public bodies that perform well, campaigns to address secrecy problems and communications campaigns encouraging bodies that are improving and criticizing those which remain excessively secret. Another possibility is the production of an annual report to Parliament and/or parliamentary bodies on remaining problems and achievements, which might also include measures taken to improve public access to information, any remaining constraints to the free flow of information which have been identified and measures to be taken in the year ahead.

Public bodies should be encouraged to adopt internal codes on access and openness.

Principle 4. Limited scope of exceptions

Exceptions should be clearly and narrowly drawn and subject to strict “harm” and “public interest” tests.

All individual requests for information from public bodies should be met unless the public body can show that the information falls within the scope of the limited regime of exceptions. A refusal to disclose information is not justified unless the public authority can show that the information meets a strict three-part test.

The three-part test:

- The information must relate to a legitimate aim listed in the law;
- Disclosure must threaten to cause substantial harm to that aim; and

- The harm to the aim must be greater than the public interest in having the information.

No public bodies should be completely excluded from the ambit of the law, even if the majority of their functions fall within the zone of exceptions. This applies to all branches of Government (that is, the executive, legislative and judicial branches) as well as to all functions of Government (including, for example, functions of security and defence bodies). Non-disclosure of information must be justified on a case-by-case basis. Restrictions whose aim is to protect Governments from embarrassment or the exposure of wrongdoing can never be justified.

Legitimate aims justifying exceptions

A complete list of the legitimate aims which may justify non-disclosure should be provided in the law. This list should include only interests which constitute legitimate grounds for refusing to disclose documents and should be limited to matters such as law enforcement, privacy, national security, commercial and other confidentiality, public or individual safety, and the effectiveness and integrity of Government decision-making processes.

Exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest. They should be based on the content, rather than the type of the document. To meet this standard exceptions should, where relevant, be time-limited. For example, the justification for classifying information on the basis of national security may well disappear after a specific national security threat subsides.

Refusals must meet a substantial harm test

It is not sufficient that information simply fall within the scope of a legitimate aim listed in the law. The public body must also show that the disclosure of the information would cause substantial harm to that legitimate aim. In some cases, disclosure may benefit as well as harm the aim. For example, the exposure of corruption in the military may at first sight appear to weaken national defence but actually, over time, help to eliminate corruption and strengthen the armed forces. For non-disclosure to be legitimate in such cases, the net effect of disclosure must be to cause substantial harm to the aim.

Overriding public interest

Even if it can be shown that disclosure of the information would cause substantial harm to a legitimate aim, the information should still be disclosed if the benefits of disclosure outweigh the harm. For example, certain information may be private in nature but at the same time expose high-level corruption within Government. In such cases, the harm to the legitimate aim must be weighed against the public interest in having the information made public. Where the latter is greater, the law should provide for disclosure of the information.

Principle 5. Processes to facilitate access

Requests for information should be processed rapidly and fairly and an independent review of any refusals should be available.

A process for deciding upon requests for information should be specified at three different levels: within the public body; appeals to an independent administrative body; and appeals to the courts. Where necessary, provision should be made to ensure full access to information for certain groups, for example those who cannot read or write, those who do not speak the language of the record, or those who suffer from disabilities such as blindness.

All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information. Generally, bodies should designate an individual who is responsible for processing such requests and for ensuring compliance with the law.

Public bodies should also be required to assist applicants whose requests relate to published information, or are unclear, excessively broad or otherwise in need of reformulation. On the other hand, public bodies should be able to refuse frivolous or vexatious requests. Public bodies should not have to provide individuals with information that is contained in a publication, but in such cases the body should direct the applicant to the published source.

The law should provide for strict time limits for the processing of requests and require that any refusals be accompanied by substantive written reasons.

Appeals

Wherever practical, provision should be made for an internal appeal to a designated higher authority within a public authority who can review the original decision. In all cases, the law should provide for an individual right of appeal to an independent administrative body from a refusal by a public body to disclose information. This may be either an existing body, such as an Ombudsman or Human Rights Commission, or one specially established for this purpose. In either case, the body must meet certain standards and have certain powers. Its independence should be guaranteed, both formally and through the process by which the head and/or board is/are appointed.

Appointments should be made by representative bodies, such as an all-party parliamentary committee, and the process should be open and allow for public input, for example regarding nominations. Individuals appointed to such a body should be required to meet strict standards of professionalism, independence and competence, and be subject to strict conflict-of-interest rules.

The procedure by which the administrative body processes appeals against requests for information which have been refused should be designed to operate rapidly and cost as little as is reasonably possible. This ensures that all members of the public can access this procedure and that excessive delays do not undermine the whole purpose of requesting information in the first place.

The administrative body should be granted full powers to investigate any appeal,

including the ability to compel witnesses and, importantly, to require the public body to provide it with any information or record for its consideration, in camera where necessary and justified.

Upon the conclusion of an investigation, the administrative body should have the power to dismiss the appeal, to require the public body to disclose the information, to adjust any charges levied by the public body, to fine public bodies for obstructive behaviour where warranted and/or to impose costs on public bodies in relation to the appeal.

The administrative body should also have the power to refer to the courts cases which disclose evidence of criminal obstruction of access to or wilful destruction of records. Both the applicant and the public body should be able to appeal to the courts against decisions of the administrative body. Such appeals should include full power to review the case on its merits and not be limited to the question of whether the administrative body has acted reasonably. This will ensure that due attention is given to resolving difficult questions and that a consistent approach to freedom of expression issues is promoted.

Principle 6. Costs

Individuals should not be deterred from making requests for information by excessive costs.

The cost of gaining access to information held by public bodies should not be so high as to deter potential applicants, given that the whole rationale behind freedom of information laws is to promote open access to information. It is well established that the long-term benefits of openness far exceed the costs. In any case, experience in a number of countries suggests that access costs are not an effective means of offsetting the costs of a freedom of information regime.

Differing systems have been employed around the world to ensure that costs do not act as a deterrent to requests for information. In some jurisdictions, a two-tier system has been used, involving flat fees for each request, along with graduated fees depending on the actual cost of retrieving and providing the information. The latter should be waived or significantly reduced for requests for personal information or for requests in the public interest (which should be presumed where the purpose of the request is connected with publication). In some jurisdictions, higher fees are levied on commercial requests as a means of subsidizing public interest requests.

Principle 7. Open meetings

Meetings of public bodies should be open to the public

Freedom of information includes the public's right to know what the Government is

doing on its behalf and to participate in decision-making processes. Freedom of information legislation should therefore establish a presumption that all meetings of governing bodies are open to the public.

“Governing” in this context refers primarily to the exercise of decision-making powers, so bodies which merely proffer advice would not be covered. Political committees - meetings of members of the same political party - are not considered to be governing bodies.

On the other hand, meetings of elected bodies and their committees, planning and zoning boards, boards of public and educational authorities and public industrial development agencies would be included.

A “meeting” in this context refers primarily to a formal meeting, namely the official convening of a public body for the purpose of conducting public business. Factors that indicate that a meeting is formal are the requirement of a quorum and the applicability of formal procedural rules.

Notice of meetings is necessary if the public is to have a real opportunity to participate and the law should require that adequate notice of meetings is given sufficiently in advance to allow for attendance. Meetings may be closed, but only in accordance with established procedures and where adequate reasons for closure exist. Any decision to close a meeting should itself be open to the public. The grounds for closure are broader than the list of exceptions to the rule of disclosure but are not unlimited. Reasons for closure might, in appropriate circumstances, include public health and safety, law enforcement or investigation, employee or personnel matters, privacy, commercial matters and national security.

Principle 8. Disclosure takes precedence

Laws which are inconsistent with the principle of maximum disclosure should be amended or repealed. The law on freedom of information should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions. Where this is not possible, other legislation dealing with publicly held information should be subject to the principles underlying the freedom of information legislation.

The regime of exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it. In particular, secrecy laws should not make it illegal for officials to divulge information which they are required to disclose under the freedom of information law.

Over the longer term, a commitment should be made to bring all laws relating to information into line with the principles underpinning the freedom of information law. In addition, officials should be protected from sanctions where they have, reasonably and in good faith, disclosed information pursuant to a freedom of information request, even if it subsequently transpires that the information is not subject to disclosure. Otherwise, the

culture of secrecy which envelopes many governing bodies will be maintained as officials may be excessively cautious about requests for information, to avoid any personal risk.

Principle 9. Protection for whistle-blowers

Individuals who release information on wrongdoing - whistle-blowers - must be protected

Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing. “Wrongdoing” in this context includes the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, or serious maladministration regarding a public body. It also includes a serious threat to health, safety or the environment, whether linked to individual wrongdoing or not. Whistle-blowers should benefit from protection as long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing. Such protection should apply even where disclosure would otherwise be in breach of a legal or employment requirement.

In some countries, protection for whistle-blowers is conditional upon a requirement to release the information to certain individuals or oversight bodies. While this is generally appropriate, protection should also be available, where the public interest demands, in the context of disclosure to other individuals or even to the media.

The “public interest” in this context would include situations where the benefits of disclosure outweigh the harm, or where an alternative means of releasing the information is necessary to protect a key interest. This would apply, for example, in situations where whistle-blowers need protection from retaliation, where the problem is unlikely to be resolved through formal mechanisms, where there is an exceptionally serious reason for releasing the information, such as an imminent threat to public health or safety, or where there is a risk that evidence of wrongdoing will otherwise be concealed or destroyed.