Standing Committee on Law Amendments
Ombudsman's Submissions on Bill 82

November 5, 2008

Introduction:

The Ombudsman welcomes the opportunity to make submissions to Law Amendments Committee on Bill 82, the proposed *Access to Information and Protection of Information Act*. The right to information and the right to privacy are emerging as increasingly important and defining fundamental rights in the information age. In the 21st century, information and privacy rights will not only define how we govern ourselves and the relationship between citizens and the State, they will define even more significantly how we do business with one another and how successful we are in competing in local, regional and global markets.

With Bill 82 the province has a good opportunity to set a standard that would do more than merely make the Province of New Brunswick current with other Canadian and foreign laws in this rapidly changing legal landscape. We could in fact establish a legal framework that others would look to as the new standard: one where government is meaningfully accountable to citizens and where public engagement is a matter of course; a legal standard where privacy, not secrecy, is promoted and protected; and one where businesses interested in moving ahead in an economy increasingly dominated by information, trust and reputation can find a welcome home.

This is the path which the Ombudsman would encourage law makers to take. The proposed bill in our view would require substantial amendment to reflect this course, but the thrust of reform is already in this direction. The legislation eventually adopted by the Legislature, even when modified by Law Amendments Committee, should be conceived as a first step in this new direction.

The Ombudsman has set out in the following pages the critical elements of the amendments required to the bill. We would be pleased to assist the Clerk's Office, the legislative drafting team and the Committee in its clause by clause analysis of the bill. The following proposals for amendment have been grouped around the main sections of the proposed bill. Part 1 deals with the Act's Definitions purpoe and scope of application, part 2 deals with access to information, part 3 with Privacy, parts 4 and 5with oversight and review, and parts 6 and 7 with the Act's general provisions, regulation-making authority and consequential amendments to other legislation. The Ombudsman's submissions include and build upon the summary points made to Committee members in public and in camera sessions on October 28th.

Part 1 – Definitions, Purpose and Application

The first part of Bill 82 sets out the definitions section, a purpose clause and provisions detailing the scope of the law and exempting certain records from the Act's application altogether. The advantages of the provisions proposed in sections 1 to 4 include the broad definition of public body and the extension of the Act's application to municipalities, universities, police authorities and all public bodies, a good many of which are now included in Schedule A of the Act for illustrative purposes.

There is however, in our view, room for improvement. My main concerns, set out below, are that some of the definition provisions could be improved, the purpose clause should be significantly strengthened or removed, and the list of records excluded from the Act's application should be kept to a minimum.

The definitions provided

One recommendation we have is with respect to the definition of "government body" which includes boards all the members of which are named by statute or by cabinet. Also included are any boards or agencies expressly listed in the Schedule. Many public boards or agencies have members named by Court appointment, by a local public body, by public parent corporation or by their membership. For the sake of completeness, it would be preferable in our view for these provisions to follow the language of the New Brunswick *Ombudsman's Act* which defines public bodies as:

> "A person, corporation, commission, board, bureau or other body that is, or **the majority of the members of which** are, or **the majority of the members of the board** of management or board of directors **of which** are: *(a)* appointed by an Act, Minister or the Lieutenant-Governor in Council, *(b)* in the discharge of their duties, public officers or servants of the Province, or *(c)* responsible to the Province." (my emphasis)

My main concern with the definition section however is the definition of personal information. The proposed definition is perhaps an improvement upon the existing provision under our *Right to Information Act* and *Protection of Personal Information Act*. It is not however a best practice in Canada. The provisions of more recently adopted statutes in Newfoundland, Nunavut, Yukon and PEI all seem to be modeled more closely on the definition in the Alberta statute which is more succinct. British Columbia has a very succinct definition similar to New Brunswick's but which expressly limits the excessively broad interpretations which courts have allowed here: "*personal information* means recorded information about an identifiable individual **other than contact information**". We would recommend following either the B.C. model or the Newfoundland model for the definition of personal information.

Refocusing the Purpose Clause

Not all statutes contain a purpose clause. For the most part it is generally sufficient to determine an Act's purpose from its whole context. The *Interpretation Act* also provides that every Act is entitled to such large, liberal interpretation as will best attain the Act's remedial purpose. The Court's have also established particular interpretive principles which apply to quasi constitutional legislation such as Bill 82. If the bill is to contain a purpose clause at all it is important that this clause insist upon the Act's dominant purpose which is to promote transparency and accountability in public administration, while ensuring at the same time that the personal information of New Brunswickers is protected. A purpose clause could help make it clear that privacy should never be raised as a trumped-up shield by public authorities to hide their own mistakes.

Bill 82 has unfortunately a very weak purpose clause in section 2 which doesn't sufficiently protect either the right to information or the right to privacy. We need a

general provision that clearly establishes these rights as fundamental cornerstones of our democracy, subject to the reasonable limits set out elsewhere in the statute. The purpose clause must assert the principle that exceptions to the rights are to be narrowly construed. The purpose clause has to be about the rights, not about its limitations, otherwise it will only serve to defeat the rights the statute seeks to protect. We have to avoid language which suggests that the rights are "allowed" as though they were mere privileges, or which positions the exceptions to the rule as being somehow central to the Act's purpose.

Protecting powers of subpoena and compulsion of records
As a necessary safeguard, section 3 of the Act adds in, notwithstanding the privacy provisions of part 3 of the Bill, provisions to preserve the "power of a court or tribunal to compel a witness to testify or to compel the production of documents". This provision could be improved by repealing the words "a court or tribunal" and substituting the words "a court, tribunal or duly authorized officer of the Legislative Assembly". This would protect, with added clarity, the oversight powers of the Ombudsman, Child and Youth Advocate, Auditor General and other Legislative Officers.

Limiting the type of records excluded
While the expanded scope of the Act is very welcome, section 4 of the Act has unfortunately ushered in a new series of legislative carve-outs, many of which should be dealt with through the exemptions rather than these proposed exclusions. The comparison with other Canadian statutes including our own existing *Right to Information Act* suggests that such exclusions should be very limited. The United Nations Principles on drafting Freedom of Information legislation suggest the same approach. For instance while excluding court records or records of members or officers of the Legislative Assembly may be common practice in Canada, the exclusions contemplated in paragraphs g) to l) of section 4 would more appropriately be dealt with by way of exemptions to Act. Their inclusion in this list places the statute on a slippery slope where many others may, whenever the moment is ripe, want to jump on this "band-wagon of unaccountability". The most glaring and disturbing example of this is the provision proposed in paragraph 4(b) which would exclude "a record pertaining to legal affairs that relate to the performance of the duties and functions of the Attorney General".

It appears from our review of the statutes elsewhere that this provision is quite unprecedented. A plain reading of the provision suggests that it purports to exclude the Attorney General's Office almost completely from the Act's application. Yet as the Executive and Court Officer primarily responsible for maintaining the rule of law in this Province, the Attorney-General should be the person most interested in ensuring transparency in the administration of his office. Solicitor-client privilege should remain a qualified privilege, as it pertains to legal officers of the Crown. We need more scrutiny and independent oversight of the administration of the Crown's legal affairs, not less. Otherwise the administration of justice and those who administer it may too easily fall into disrepute. In our view it would be very damaging to the principles of Freedom of Information in Canada to allow a provision such as paragraph 4g) to become law.

Part 2 – Access to Information

Part 2 of Bill 82 deals with the right to information the exceptions to this right and the manner in which the right should be exercised. It has some very encouraging developments as far as New Brunswick law is concerned since it adopts "duty to assist" provisions, provides for access requests being treated in alternate formats to accommodate various requesters and provides also for electronic requests and requests for electronic records. The main concerns I have with this part of the bill is that it lacks stronger provisions proclaiming the right to information itself, that the exemptions are now much too detailed and broad, that several exemptions are now made mandatory and lack reasonable limits and that there is no general public interest override provision regarding the exemptions.

Proclaiming the right to information
The most important provision in the Bill is of course section 6 which proclaims the right of access. Given the fundamental nature of this right, and its importance in our democratic system of government, we submit that it is important that the right be proclaimed in unequivocal terms. In this respect the provisions of sections 2 and 2.1 of our current *Right to Information Act* are a model for other Canadian jurisdictions. The Ombudsman recommends that the provisions in section 6 of Bill 82 be modified in order to retain the scope, clarity and concision of sections 2 and 2.1 of New Brunswick's *Right to Information Act*.

Similarly with respect to the privacy Rights set out in the Bill, while we favour the retention of the enumeration of all ten privacy principles presently protected by *POPIA*, we would repeat the submissions made to the Savoie Committee which recommended including fundamental privacy rights clauses modeled upon the *Quebec Charter of Rights and Freedoms*' provisions and which protect the distinct aspects of the right to privacy including the safeguard of a person's dignity and reputation, respect for one's private life, the peaceful enjoyment of property, the inviolability of one's home, respect for private property, the right to secrecy regarding one's personal information, and particularly the protection of professional and fiduciary confidences. These are all rights which New Brunswickers take for granted. Unfortunately they often do not find express protection in our law and it would be appropriate and timely for the Legislature to confer a statutory protection on these principles by including clear provisions to that effect in Bill 82.

Public Interest Override
Bill 82 outlines mandatory exemptions than are not contained in the *Right to Information Act*. Most other Canadian jurisdictions temper these exemptions with a general public interest override clause that would allow a head of a public body to disclose information where it is "clearly in the public interest". Manitoba's statute is exceptional in Canada in that it has no general public interest override. We should not follow the model in Manitoba. As it stands now, in Bill 82, only 3rd party business interests are subject to such an override.

The Ontario Court of Appeal recently read-in to the provisions of the Ontario *Freedom of Information and Protection of Privacy Act* (FIPPA) a public interest override to mandatory exemptions where none was provided, arguing that it was a violation of freedom of expression rights under the Charter to fail to provide one. This underscores the common sense view that cases may often arise where disclosure in favour of environmental protection, public safety, public health or other such public interests has to be given precedence. We submit that this is a general principle that should qualify all exemptions and that the provisions should require a balancing of the public and private interests at stake. This is preferable to the jurisdictional approaches which require no balancing of interests. This is an important qualifier on the distinction between mandatory and discretionary exemptions which is now being introduced into our law. Our failure to include such a qualifier on the exemptions listed may lead not only to constitutional challenges to the law in our province it would also quite certainly result in a rigid literal application of the law and a refusal of disclosure when disclosure may be strongly in the public interest. Guarding against this result, as other provinces have done, would be a very prudent measure.

Narrowing exemptions

While the *Right to Information Act* is in need of updating, it does have much to recommend it. Additionally, we have 30 years of judicial interpretation of our statute, more than any other Canadian jurisdiction. By repealing and replacing the wording of all those provisions, especially the substantive provisions around the exemptions, we are also throwing out 30 years of jurisprudence and acquired rights. It is important to be mindful of what we would lose by changing every provision of the current legislation.

The most worrying changes are around the proposed cabinet confidence and advice to Minister exemptions. The Right to Information and Protection of Personal Information Task Force (the "Savoie Task Force") had recommended tightening up these provisions. Unfortunately, Bill 82 goes quite markedly in the other direction, loosening the exemptions so much that the right to access information will most often be compromised. This is also one area where the legislative proposals fail to follow through on the government's commitment to improve our democracy through improved public engagement. Throwing a veil of secrecy over the entire policy development process is contrary to principles of meaningful public engagement where citizens should be invited into decision-making.

In addition to the changes to cabinet confidences and advice to public officials provisions, there are also other exemptions which are much broader than the existing exemption in the *Right to Information Act.* The provisions relating to "disclosures harmful to law enforcement" (section 27) and "Disclosure harmful to economic and other interests of a public body" (section 28) once again expand the body of information that will not be released. Also of concern is the exemption in proposed section 31 for "Information that is or will be available to the public". Committee members should be careful to limit the ease with which public officials can refuse disclosure on the basis that full disclosure will be made as planned at a future date "all in good time". On meaningful issues of public interest this type of exception could easily be abused.

Fee Structure
As was mentioned in our submission to the Savoie Task Force and my oral comments to the Standing Committee, I am concerned about the proposed fee structure. We believe the impetus for this lies in the concerns from many that the current structure is not covering the costs of the process. It is not supposed to do so. Open and transparent government should not offered only on a cost recovery basis. It should quite simply be a part of doing public business. In practice tax-payers are already footing the bill for all public services provided. They should therefore not have to pay again through an access to information fee structure to keep tabs on public officials and find out about how decisions are made. Placing fees on access to information laws is a little bit like a tax on democracy, or having to pay to vote. It's simply bad public policy.

In this respect Quebec has adopted the best practice in Canada. In that province there is no charge for filing, no search fees, only photocopying charges and these can be waived. This approach ensures that petitioners do not abuse their right, while at the same time protecting the right from cost disincentives. There is no rationale advanced for a fee for service or cost-recovery mechanism, and yet that is what Bill 82 would allow. The Bill would even allow a fee to be charged for accessing one's own personal information, contrary to the long-established practice in this province. New Brunswickers have had much greater access under the fee process which has existed here for the past 30 years. We can afford to do better. We deserve no less.

Part 3 – Protection of Privacy

Retain POPIA's ten privacy principles
Like the *Right to Information Act*, it was also time to review the *Protection of Personal Information Act*, however, it too has much to recommend it. In New Brunswick, we currently have the gold standard. We should not be moving away from it when everyone else is increasingly moving in that direction. POPIA is simple and based on the ten principles outlined by the OECD, by the Canadian Standards Association's Model Privacy Code and by PIPEDA, Canada's private sector privacy legislation. Increasingly New Brunswickers are aware and have been trained to keep constantly in mind these ten basic privacy principles. We should not confuse matters by replacing our public sector legislation with a law which captures only imperfectly some of these principles and which is therefore out of step with standards applied in the private sector in our province or in public sectors the world over.

To take only one example, the safeguards principle is more clearly set out in our existing legislation than in what is proposed in Bill 82. Section 40 of Bill 82 is similar to section 41 in the Manitoba's *Freedom of Information and Protection of Privacy Act*. In Manitoba, this provision has proven to be "woefully inadequate" according to the Manitoba Ombudsman. Similarly Bill 82 does not adequately capture the accountability principle or the openness principle protected by our existing privacy laws. It is important that the focus remain on the ten principles that are increasingly established as the universal standard. We recommend that sections 35 to 46 of the Bill be repealed and

replaced with provisions based upon section 2 and Schedules A and B of the *Protection of Personal Information Act.*

Personal information banks and mandatory breach notification
Part of the purpose of reviewing and updating any piece of legislation is to include new ideas and initiatives at may not have been thought of during the original legislative drafting process. Personal information banks and mandatory breach notifications are relatively recent additions to the access and privacy world. Technology has enabled vast amounts of personal information to be collected and placed in one location. Many public agencies maintain their own personal information data banks for prescribed uses under their relevant statutory authority. Keeping tabs on the growth, retention and use of such information is an increasingly overwhelming task. One helpful approach is to keep public officials honest by requiring them to register and demonstrate approved usage and storage safety practices. Sections 44-46 of Ontario's FIPPA are a good model. Public bodies in New Brunswick should also be required to register with the Commissioner their personal information data banks and the type of information collected. We recommend that Bill 82 be amended by adding in provision based upon Ontario's sections 44 to 46.

In addition to registering personal information banks, public bodies should also be subject to a duty to report breaches of personal information to the Information and Privacy Commissioner. This legislative standard is increasingly being adopted by many North American jurisdictions and is the type of self-reporting standard that makes complaints based oversight workable. It is impossible for oversight bodies to investigate and make recommendations or orders with respect to breaches, if they don't know they exist. Given the nature of privacy breaches, which citizens themselves often view as *de minimis* matters with which they won't be troubled, poor practices can easily be adopted and remain unchecked in our work routines if complaints-based compliance is our only enforcement tool. Breach notification requirements impose a higher degree of diligence on public agencies and allow for much earlier and better enforcement of the law. We recommend that Bill 82 be amended by adding in breach notification provisions.

Parts 4 & 5 – The oversight body and review

Options available
As stated in my submissions to the Savoie and Finn Malone Task Forces (on personal health information access and privacy legislation) as well as in my public comments to the Standing Committee, we certainly welcome the creation of an arms length Commissioner's Office. This is the ideal model to ensure that access and privacy issues get the attention they deserve. However our recommendation for a separate oversight office also included the provision that this new Legislative Officer be given order-making powers.

Bill 82 establishes instead a separate commissioner for access and privacy issues without order-making power. A Commissioner who can't make a binding decision on a narrow

issue of disclosure of a given government record, is perhaps more of a hindrance than any help to someone. Taking all things into consideration we see at least three perhaps four options available to government regarding the oversight body:

- One is to leave the function with the Ombudsman, as the Savoie Task Force recommended, along the lines of the Manitoba or Yukon model;
- The second is to create an independent Commissioner's Office with the power to make binding orders upon the Quebec or Alberta model;
- A further alternative would be to have this second option , as in Quebec, but like them to establish a specialized internal Ombudsman for Personal Health Information whose recommendations could be reviewed or appealed to the Privacy Commissioner;
- The last alternative, which in my experience is not workable, is the Saskatchewan or Newfoundland model proposed in Bill 82 with an Information and Privacy Commissioner who has only a power of recommendation.

We share with everyone grappling with these issues a desire to help develop an enforcement mechanism for New Brunswickers that will be as effective, as accessible and as affordable as possible. With that in mind, I think, any of the first three options outlined above are preferable to the solution offered in Bill 82.

The advantages of Option 1, leaving the mandate with the Ombudsman, are to ensure the continuity in service, minimize public expenditure and to build upon a tradition of independence and consistent application of the principles of privacy and access that the Ombudsman's Office has been able to offer. Option 1, however, is clearly not cost neutral, since significant new investments in this mandate have been waiting on government's decision, now before the Committee, and are overdue. Our office is still by far the least well resourced oversight office in Canada on a per capita basis (11 full time staff in Manitoba, 8 in Newfoundland, 6 in Saskatchewan, the Quebec Commission's budget has just doubled last year to allow their staff to expand from 40 to 70 full-time staff). Adding to this issue is the introduction of the Personal Health Information Access and Privacy legislation that no doubt increase the workload of the Office.

The second model, as I had earlier recommended, would really significantly advance the protection of access and privacy rights in New Brunswick. This is the approach taken in BC, Alberta, Ontario, Quebec and PEI. The advantages of this approach are several:

- A commissioner with binding order-making power will be able to effect settlement of access disputes in the vast majority of cases;
- A commissioner that can make orders will be able to interpret, explain and advance the development of this specialized area of law consistently with approaches in other Canadian jurisdictions, particularly since litigants in this field of law are rarely represented;
- Complaints would be dealt with more speedily and with finality at first instance in the vast majority of cases;

- With this approach all litigants will be able to access a binding ruling without expensive court proceedings;
- Access to costlier court remedies would still be available as a review mechanism to guide the Commissioner;
- As the Personal Health Legislation applies to parts of the private sector as well as the public sector, order-making will be a much more effective and necessary mechanism for compliance

The remaining third option is really a variation of the second, leaving the complex administration of personal health information matters at first instance to an arms length officer of the administration reporting to the Minister of Health.

The last option is what is outlined in Bill 82, but as we've mentioned it's not really an effective way of enforcing access or privacy rights. Already this year several of my own recommendations have been refused or simply ignored. Moreover, decisions from our courts last year on the definition of personal information have greatly increased the burden of administration of our law and placed it at odds with accepted Canadian law in every other province. New Brunswickers simply deserve, and can easily afford better results. We recommend that Bill 82 be amended to provide the Information Commissioner with order-making powers and other investigative powers based upon the provisions of sections 60 to 68 of the Prince Edward Island *Freedom of Information and Protection of Privacy Act.*

Stronger guarantees of independence
Looking at the specific provisions in Bill 82 establishing the Information and Privacy Commissioner's office it is encouraging to see that many of the guarantees of independence found in the statutory provisions of other legislative officers have been incorporated there. Some however have not been followed. With regards to the mandate, we submit that it is inappropriate to leave a legislative officer's term for a varying term of 5 or 10 years. The great discrepancy in terms leaves the office open to influence. Similarly, the same is true with respect to the level of remuneration. Failing to provide clear statutory provisions regarding the level of remuneration is a clear limit upon the Commissioner's independence, particularly when used in combination with a varying and renewable term. It is recommended that the Act be amended to provide that the Commissioner's salary be fixed, as is the Ombudsman's in keeping with that of a provincial court judges, or minimally as is the Official Languages Commissioner's in keeping with that of deputy heads in government. Given the recommendations we make with respect to the Commissioner's power to verify solicitor client privilege, we would recommend also that criteria for appointment be developed in keeping with those applicable to appointment to the Bench and including at minimum a requirement that the candidate be a member of ten year's good standing with a provincial Bar Association.

Budgets and Resource requirements
At this junction, we feel it is important to emphasize to Standing Committee members the importance of appropriate resource allocation to ensure that these reforms meet with success. One thing our office has learned from our experience investigating complaints

under *POPIA* and dealing with oversight agencies in other jurisdictions, is that our Province, to date, has grossly underestimated the cost of administering privacy and access laws. Our laws and our diet in this area could be characterized as "Privacy and Access Lite". With Bill 82, it is clear that we are stepping up to another league and we need to ensure that we allocate enough resources for it to be effective.

Proper budget and resource requirements are not just in reference to the oversight body but for the cost of administration of the legislation across the public service. These are we are aware, primarily concerns for the Executive Branch of government, but we wanted to take this opportunity to give Committee members an early heads-up about these preoccupations. We think they have implications for and should be factored in to the legislative choices you are about to make:

- Neither the Ombudsman Office, if that model is retained, nor the Information and Privacy Commissioner can have nor should be given a mandate to educate or train *public officials* on how to administer this Act. The education role of the oversight body should be for the general public, government itself should be responsible for training its employees.

- In most every other Canadian jurisdiction the Minister responsible for the Act has created a central government agency to be the Access to Information and Protection of Privacy Office (ATIPP Office). This office has the task of training all civil servants, providing advice on day-day administration, aiding in recruiting certified professionals to these tasks, developing policies at an agency and departmental level on the application of the law and reporting publicly on the administration of the Act. In Newfoundland, the last province in Canada to adopt ATIPP legislation they have had 10 full time staff in their ATIPP office over the last three years helping the civil service get ready for the implementation of their new laws.

- The Ombudsman or Commissioner's function can then be a much more arms length oversight role with an advisory function to government on proposed or adopted legislative and regulatory measures, a mandate to engage in public education on how citizens can use the law to access information or protect their privacy, to perform audits of data storage programs, etc.

- As pointed out earlier we estimate that the Commissioner's office would need a staff of seven people to adequately undertake it's mandate, but this of course is only a small portion of the costs of administration of the Act across government, particularly considering the expanded application to universities, municipalities and many new public sector agencies.

We can't emphasize enough how relieved we are to share with committee members just how big a task this is. Our office has been struggling to keep up with the demands of this

aspect of our mandate with too few resources available to us. We are very much encouraged that with this proposed legislation we're entering into a new stage.

Verifying Cabinet confidences and Solicitor-Client records
Recent case law has brought to the forefront issues relating to solicitor-client records and we would like to take the opportunity to address this issue. What we propose is that the Commissioner should be able to review solicitor-client privileged records for the purpose of verifying the claim. This approach would preserve the status quo in New Brunswick, since the Ombudsman's review function under the Right to Information Act has regularly included this verification mechanism and New Brunswickers have been well-served by this effective and comprehensive approach to claims to protect solicitor-client privilege in the public sector. Courts have always said that this is appropriate where there is clear statutory language requiring such, and that's why it's important that Bill 82 have clear provisions to that effect. The alternative doesn't really protect solicitor-client privilege. In fact, it protects impunity.

Under section 59 of Bill 82 the Commissioner would have a right of entry "to enter any office of a public body and, subject to section 67, examine and make copies of any record in the custody of the public body". Additionally, section 67 would specifically exclude the Commissioner's access to "Executive Council confidences and any document that contains information that is subject to solicitor-client privilege"— thus preventing the Commissioner from being able to access and review any documents claimed as privileged. No such limitation on right of entry can be found in the Manitoba, Alberta, PEI, Saskatchewan and Newfoundland Acts. We do not feel it is helpful to limit the Commissioner's power in this fashion. We recommend that Bill 82 be amended by the inclusion of provisions modeled on section 53 of the PEI statute and specifying further that the Commissioner's production powers in an investigation, inquiry or review or review apply "despite any other enactment or any other privilege of the law of evidence *including any claim of solicitor client privilege, litigation privilege or similar privilege invoked by the Crown*".

Parts 6 & 7 – General Provisions and Consequential amendments

Regulation-making authority
The regulation making authority is one area of the proposed Bill that could be significantly improved to address the demands of regulating access and privacy in the public sector regarding services that are increasingly available on-line:

- Regulations should set out ways to facilitate on-line access to information and on-line filing of access petitions, reviews and complaints;
- Regulation-making authority could be added to restrict data-mining and regulate data-sharing practices within the public sector;
- Regulations should be developed also to encourage the use of "open source" code and limit the use of "trusted systems" in public sector information management practices;

- Regulations should also set out the range of privacy invasive technologies or surveillance technologies that could be subject to approval or review by the privacy Commissioner prior to their adoption or development (eg use of biometric data or video-surveillance cameras by schools or other public bodies)

Mandatory Review Clause
Given the length of time the *Right to Information Act* has been in existence without being reviewed, it is important to include a mandatory review clause in the new access and privacy legislation. However, eight years is simply too long. The Manitoba *Freedom of Information and Protection of Privacy Act* requires a review after five years, as do most other Canadian statutes. In our opinion, the legislation should be reviewed within three years and then every five years thereafter. This makes the most sense given the nature of the rights protected and the changes in technology. The reason for the three years up-front is because there will be a delay of proclamation in order to give municipalities, universities and other public bodies time to get up to speed.

Moreover, the greatest gap in privacy enforcement in New Brunswick today, is arguably the protection of the privacy of employees in a workplace setting. The federal private sector law does not apply as a result of Canadian constitutional and labour law principles. Unfortunately, provincial labour laws do not protect employee privacy in a substantially similar manner. Bill 82 does nothing to address these concerns. We recommend that dedicated efforts be made over the next three years to devise the best and most appropriate legislative means of addressing this significant gap in protection and that this issue be considered as a major element of the proposed legislative review in three year's time.

Conclusion

We wish to thank Committee members once again for the opportunity to provide input and share these concerns at this stage. We remain interested and committed to providing such further assistance and advice on these important reforms as committee members may direct.

In our view Bill 82 has proposed some promising changes in our access and privacy regime, but it is in need of significant modification if we want to preserve and build upon the strengths of our existing laws and avoid some troublesome set-backs.

We would encourage committee members to look to the social and economic implications of this legislation. With even modest efforts we can seize this opportunity to position the Province at the forefront of accountability and privacy laws in North America. This will strengthen our democracy by allowing greater public participation in decision-making. With the right leadership and legislative direction it will also strengthen our economy by nurturing an information and privacy savvy culture at a time when our society and economy is increasingly being built upon information, trust and reputation.