Restoring Balance

A submission to the Independent Statutory Review Committee on the Access to Information and Protection of Privacy Act

By Edward Hollett

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The current review of the Access to Information and Protection of Privacy Act is the type of broad review that one would expect for legislation of its type after about a decade of experience with it.

The scope of work for the committee is simply stated as "a comprehensive review of the provisions and operations of the Act" in the terms of reference. The only definition given to that statement is the identification of certain specific issues that the committee must address. Other than that, the terms of reference are broad and that is as it should be.

The province's first open records laws went for almost 20 years without a review or significant change. As the committee members will know, the committee appointed in 2000 recommended that the government repeal the old legislation as well as the separate Privacy Act and replace them with a new one that accomplished four general purposes.

Firstly, the new Act should recognise the right of the public to information held by government. Secondly, it should protect personal privacy. Thirdly, the new Act was to ensure access to one's own personal information. Fourthly and perhaps most significantly, the new Act created an independent review mechanism for decisions made by government departments and agencies.

The creation of an independent review mechanism was a significant change because it represented a review mechanism that simply was not present in the early legislation. The old Freedom of Information Act gave the ombudsman a duty to review freedom of information decisions but this was never a satisfactory approach. Once government eliminated the position in the early 1990s, applicants had no recourse to appeal a decision by a department or agency except to go before a judge with all of the costs associated with it.

In general, the new Act worked. It did not significantly change the practical aspects of access either in the mandatory or discretionary exemptions. After a period of training and orientation to the new Act, public servants got on with the job of answering requests.

Despite the claims made in 2012 at the time the government introduced Bill 29 to amend the Act, there is no indication that the Act has ever been burdensome. In 2012, for example, the Access to Information and Protection of Privacy Office reported 660 requests in total. That represents about three access requests per day for all government departments and the bodies covered by the Act. That's not three requests for each, but three in total, per day.

The same report also provided a breakdown of the 285 access requests - less than one per day - received by individual departments. Again, one does not see anything that looks like an administrative headache. The transportation and works department handled 38 requests. Environment and conservation received 29. Education and Advanced Education each received 24 and finance received 23 requests. The Premiers Office received only 13 requests, about one

a month, while cabinet secretariat handled eight requests. That is roughly what the Premier's Office received 20 to 25 years ago, incidentally.

The review committee report in 2000 titled its report *striking a Balance*. That seems to be what the new Act did. Consistent with similar legislation across the country, the 2002 Act balanced the public right to access government with necessary restrictions on access for cabinet confidences and commercially sensitive information.

Bill 29 changed the balance. The amendments to the Act made in 2012 generally favoured the public servants and politicians who both hold the information people want and administer the Act. They are not impartial actors. They have vested interests in disclosure of information that must be acknowledged in legislation and in any review.

Those interests, aligned in 2011 and 2012 created Bill 29. The political reaction to Bill 29 led cabinet to appointment this review committee and it is to the administrative and political context in which the Act must live that this brief addresses itself.

The defining aspect of provincial administration since 2003 has been the fusion of the public service and partisan political staff at the senior levels and the infusion of decision-making at the highest levels with a partisan, political consideration above all. The situation reflects what Peter Aucoin has called New Political Governance[1] or Donald Savoie[2] has called Court Government.

Aucoin highlighted four features of New Political Governance:

- the integration of executive governance and the continuous campaign,
- partisan-political staff as a third force in governance and public administration,
- a personal politicization of appointments to the senior public service, and
- an assumption that public service loyalty to, and support for, the government means being promiscuously partisan for the government of the day.

Savoie has described court government as simply the centralization of power in the hands of the first minister and a small coterie of advisors, most usually unelected but potentially including some key cabinet ministers such as the minister of finance. The premier's court makes all the major decisions, controls government communications through direct

[1] Peter Aucoin, "New Political Governance in Westminster Systems: Impartial Public Administration and Management Performance at Risk," *Governance*, Volume 25, Issue 2, pages 177–199, April 2012
[2] Donald Savoie, *Power: where is it?*, (Montreal: McGill-Queen's University Press, 2010)

management of the central agencies with routine items and ones of no personal or political interest to the court left to work their way through the traditional, departmental bureaucracy.

Both are describing essentially the same phenomenon, although they do so using different terms.

In this world, traditional distinctions between political staff and the public service have eroded to the point where none of the people within the system typically recognise the difference between people who are there for a short time but who may wield considerable influence (the political people) and career public servants who, traditionally, were able to provide advice and in some instances counter-weight to decisions based on their long tenure.

We have seen NPG or court government manifest in a number of ways over the past decade in the provincial government.

At the most senior levels of the public service, appointments remain as they always have been, the prerogative of the Premier. That prerogative was tempered somewhat in the view of Gordon Osbaldeston by the fact that appointment was made by cabinet.

That is still true on paper. In practice, though, we are now in a world where the Premier can and will direct action within a department and inform the minister afterward. Over the past decade however, we have arrived at a place where - for example - a deputy minister can supply briefing notes to the Premier's Office without advising the minister and without suffering any serious consequences afterward.

More recently, we have seen the pace of senior appoints change such that within a given two year period, the Premier has changed the equivalent of every position in the senior public service (ADM and DM) at least once. Individuals may have stayed in one place here and there for extended periods, but overall, the number of appointments and changes has equalled the number of positions themselves.

In some instances individuals are moving frequently, however. In at least one case, an individual moved four times in the space of two years. While there is no research yet that has conclusively determined this, experience elsewhere suggests that this level of turmoil would serve to undermine the stability of tenure on which the public has traditionally relied as the basis for providing advice to its political masters.

Senior public servants are now as transient as the politicians and political staff with whom they mingle daily. In a similar fashion, they also appear to be interchangeable. There are at least two instances in the past decade of openly partisan individuals who occupied deputy ministerial appointments. One of them continues to do so.

Communications staff has been considered officially as public servants since 2003 but in practice they have moved around with ministers more like political staff. Their activities are controlled and co-ordinated by a central secretariat that reports to or is at the very least responsive to the Premier's Office.

As an example of the interchangability of political staff and supposedly non-political staff, consider most recently that a director moved from a line department to the Premier's Office in what is obviously a political position and moved back to the line department afterward. Perhaps more significantly, a former assistant secretary to cabinet moved into the public service position from the political position in the Premier's Office. In her new position she routinely made partisan comments in public and this seems to have been generally accepted as normal and appropriate.

Government is a mountain. To those of us outside government, the mountain appears to be capped by clouds and fog. These days, it appears that the shroud of fog is denser than ever, even to those who work at the uppermost reaches of the government mountain. The shroud also extends farther down the mountain than it used to. The implication for the access to information law is that it is administered in the fog, where political considerations often trump others.

We have seen some practical examples of this. A person who wanted a copy of a speech delivered by the Premier of Newfoundland and Labrador at a dinner in Calgary a few years ago merely had to speak to the Premier's aide who was in the room. The aide sent an electronic copy of the speech immediately by e-mail using a government-issued Blackberry.

At about the same time, someone who was a "known critic" of the administration requested copies of all public speeches delivered by the Premier since 2003. One might easily expect that this was an easy request to make and to answer, in full, without question and without cost. Instead, the official reply to the request demanded $10,000 as the cost of printing the speeches, manually redacting them, and then photocopying them to send by regular mail or scanning them to attach to an e-mail. The Premier used this request for speeches in comments to media as an example of the outrageous requests that he and his staff had to deal with under the provincial access laws.

This story – as ludicrous as it is true – reflects the extent to which the response to access requests has been determined by political considerations since 2003. It is also confirmation of testimony at the Cameron Inquiry that for a period of time – we don't know how long – the Premier and his political staff vetted each access request submitted to provincial government departments. The access co-ordination office was a part of the Executive Council at the time. As the official explained to inquiry commissioner, it was normal for the Premier and his staff to review the requests since the Executive Council was "the Premier's department."

Reporters have also run into a similar experience. In 2007, a reporter at the Telegram inadvertently received a copy of an e-mail from a member of the Premier's staff requesting preparation of "purple files on both" that reporter and another reporter from the same newspaper who had also requested an interview. The reporter submitted an access to information request and received the official reply that the government had no responsive records. There were no purple files, in other words.

Asked about it by reporters some time later, Premier Danny Williams admitted the files existed but said they merely contained background information to help Williams prepare for an interview. They were routine. Note, though, that the official reply was essentially a lie but since the Premier's Office both held the records and directed the reply.

As a last example, consider the blatant breach of privacy involved in a 2010 episode. The Premier's Office co-ordinated the disclosure of contents of an e-mail sent by a reporter – Craig Westcott – at the time he was hired by the Opposition Office as its communications director. Westcott was a persistent critic of the administration. The purpose was clear, namely to attack Westcott and embarrass the administration's political opponents, just as it was clear that there was no legal basis to justify the disclosure of the contents of a private e-mail.

Political administration or politicised administration of the access and privacy Act has more significant implications than just those individual episodes or even the issue raised during the Cameron inquiry into a health care crisis. According to the provincial access office 2012 annual report, the single largest number of requests came from what the report describes as "political parties." They were not actually submitted by parties but by members of the House of Assembly and their staff.

It isn't unusual for politicians to use the provincial or federal access laws to obtain documents but it is often in addition to information that members can obtain using their privileges as members of the legislature. In Newfoundland and Labrador, however, the access to information law has become increasing the only means by which politicians can obtain any information on government activity. The House po Assembly meets less frequently since 2003 than at any time since 1949. The House has no functioning committees, except for the

committee of the whole which is not a committee capable of in depth examination of government operations and activities.

Members of the House may theoretically request information by placing questions on the order paper. In practice, since 1996, however, the government tends not to respond to them. Former members of the House and former political staff have offered the view privately that there is no means by which a member could compel the government to produce documents. That is despite even the example found in a recent decision by Mr. Speaker Milliken in the House of Commons that affirmed the right of members to receive government information unredacted.

What some of those members asserted privately was that the current situation evolved from decisions taken in the late 1990s to change the procedures in the House. The parties agreed informally to rely on the access law to obtain information in exchange for modest increases in the parliamentary budget to offset the increased costs. That money was available for other purposes, as well, which may have been more of interest to them at the time.

What they compromised in practice though was the fundamental right of access to information the public has through their elected members of the House of Assembly. The access to information law compels government to redact information in some instances and gives officials the discretion to exempt other information from disclosure. The effect of these changes is the House of Assembly itself has become less and less powerful and members are less and less able to perform the duties they have in a Westminster style system to oversee the government on behalf of citizens.

Any recommendations the current review committee will make must operate in that political and administrative context. Some aspects, such as the operation of the House of Assembly are beyond the powers of the committee to address. There may be other means available that the committee can use to restore some balance between those who have information but who wish not to disclose it and those who wish to have the information or who must compel disclosure.

One means to restore the balance would be to enhance the power of the access and privacy commissioner. In that light, the committee should consider the following suggestions:

- Change the role of the commissioner to include a responsibility comparable to that of the Auditor General. This would include changing the term of appointment to a single one of 10 years duration.

- Require that the commissioner produce an annual, public audit report of both privacy and access in government. The report would be the result of a specific review of a department or agency and would include recommendations for changes.

- Give the commissioner the ability to instigate an access or privacy investigation based on his or her own information rather than relying on a reactive system based on complaints.

- Remove the time limit on production of a review commissioner's investigation. Currently, it is set at 120 days. In practice, a thorough review of the sort required by an audit may take considerably longer.