Submission to: Committee Members for Independent Review of the *Access to Information and Protection of Privacy Act*

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(Committee Members for Independent Review

of the Access to Information and Protection of Privacy Act)

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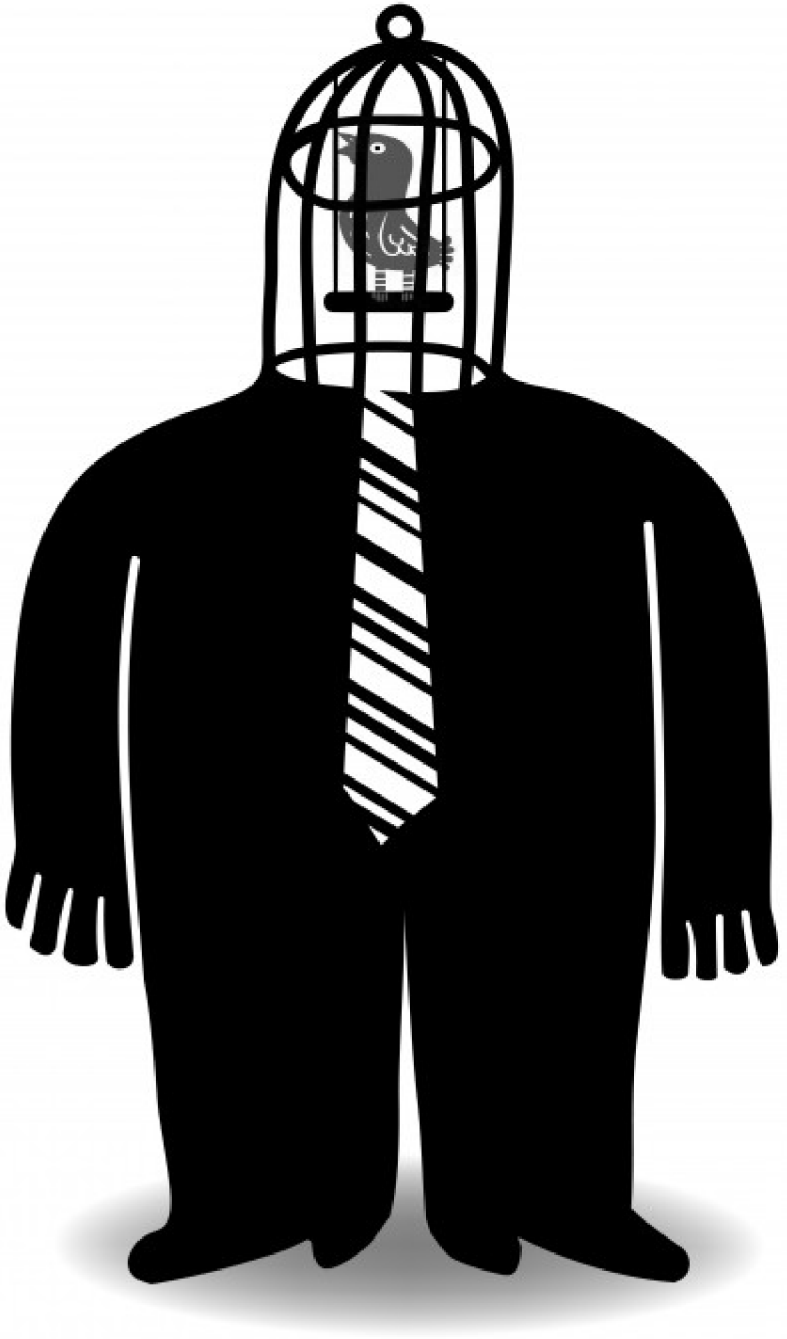
Submitted by: Terry W. Burry

[redacted] Section 30

Glovertown, NL

A0G 2L0



This is **my second submission** in relation to a Review of the Access to Information and Protection of Privacy. **My first presentation** was on May 31st, 2010 at *Hotel Gander;* **Mr. John R. Cummings, Q.C.,** *Commissioner for the Statutory Review of the Access to Information and Protection of Privacy Act* (a copy is attached).

But who was John Cummings? I'm slowly starting to realize that this was an "inside job". In other words, Cummings was handpicked by then Premier Danny Williams, because he knew that Cummings would deliver the recommendations that he wanted and needed in order to cover his tracks on Muskrat Falls, etc.; keep everything "offline" while controlling both the message and the messenger.

In my first presentation in 2010 I indicated that *. . . In my opinion, the presence of a solicitor from the Department of Justice, assisting you* [Cummings] *and on the team constitutes a conflict of interest. Mr. Cummings, you sir, should have access to a solicitor from the private bar to assist in this work. According to our records, Ms. Berlin was a Director (on the other side of our application) involved with ATIPPA as per our contact in November 2008. . . .* Please note on page 3 of my presentation to Mr. Cummings, the autoreply delay of 20 days (from November 7th to 27th) by Ms. *Berlin*. This, was, in my opinion, a premeditated, deliberate and wilful act of intentional delay. Computers don't do this on their own accord; computer software only perform the task that their human masters, program them to do. I don't know about you, but all the autoreply emails that I've ever seen occur within five seconds, not 20 days. Ms. Berlin's motive was clear, to frustrate the process of my ATIPPA application, and her first technique was to add an extra 20 days to the delay through a bogus or manipulated autoreply email

from her computer. This was the 'culture' of the Williams' administration . . . with my knowledge and my dealings throughout the years in private enterprise since the mid 1970's.

Upon reflection I now am convinced, more than ever, that this was an "inside job" . . . 'don't tell the Newfoundlanders.' Mr. Cummings' has his 'footprint' everywhere . . . *Apr 1, 2005 - JOHN R. CUMMINGS, Q.C... Deputy Minister of Justice and Deputy Attorney General.* Cummings' review was supposed to rely heavily on a public consultation process, but that never occurred. The review [to] our Access to Information Privacy Act was overseen by [Cummings] a former civil servant who had a number of years' experience turning down Access to Information requests [Cummings] heard primarily from civil servants and government departments and came up with modifications to the Act that substantially restrict the release of documents and put more and more of a control over what can be released into the hands of Cabinet. On page 1 of ***BILL 29*** *- House of Assembly*: "This Bill would amend the *Access to Information of Protection of Privacy Act.*" Then the very next statement says it all – "in spades": ***the proposed amendments would implement the majority of the legislative recommendations of the Cummings Report.***

This is all about control, and running a dictatorship, what Williams did all throughout his tenure as Premier. Like for example what Williams did by appointing the current chair [back] on the *PUB* in 2008 (and all from St. John's, an

inequality with no regional balance to any persons ‘beyond the overpass’, including an application from yours truly): *Chair and CEO of Board of Commissioners of Public Utilities Appointed*; *Premier Comments on Appointment to PUB*; *Senior Appointments announced* after he was already fired by the fifth Premier of Newfoundland and Labrador and took a lawsuit all the way to the *Supreme Court of Canada*. The golden rule . . . "If it walks, quacks and looks like a duck . . . it’s a duck." Government, in my opinion, has abdicated its democratic responsibility to be transparent all at a time when "whistle blower legislation” is touted as a great democratic instrument. Government rather than being an "honest" representative for our citizens . . . better to turn public employees into "snitches" . . . a really open process does not require, "whistle blowers".

The next thought that came to my mind . . . why did Premier Tom Marshall call an independent statutory review at this time? The conclusion that I arrived at is that the government of Newfoundland and Labrador struck this committee as a bit of a “scam”, really, or “smoke screen”, because of the declining fortunate of their own political party in relation to the public’s opposition to Bill 29 and Muskrat Falls [you cannot separate Bill 29 from Muskrat Falls, they both are intertwined]. In other words your committee would not have seen the light of day, if the government’s polling numbers were at the level that they were, say, five years ago under former Premier Williams. **Therefore**, this really has nothing whatsoever to do with the government having any genuine desire to improve Access to Information and Protection of Privacy, but **all** to do with an attempt to recapture

some better polling numbers. **Secondly**, your mandate is so limited in its scope that is it basically useless, i.e. Nalcor is out of bounds. **Thirdly**, your recommendations are not binding on government, therefore, there may be a tendency to pass over some recommendations altogether that you might otherwise want to include, and, "go soft" in the wording of other recommendations in fear that they will be rejected outright by your political masters.

Let's take a look a ***BILL 29*** *- House of Assembly*, an Act to Amend the Access to Information and Protection of Privacy Act . . .

Item 6. Section 18 of the Act is repealed under the guise of "cabinet confidences" with a long list of substituted item which will allow the provincial government to keep ministerial briefings secret, ignore requests for information that cabinet ministers deem to be "frivolous," and bar the auditor general from a wider array of records. The auditor general will now have access only to those records that the clerk says he can have. **Item 33. Section 19** even goes as far to say that the Auditor General Act is repealed and uses such language as "Prohibition" . . . "the auditor general shall not be permitted to access records", etc.

Item 21. The Act is amended by adding immediately after **section 43** a list of powers of a public body to disregard request. This will have the effect to impose a sweeping range of restrictions on people's right to know what is happening with

the provincial government — and their tax dollars. Some go as far to say that it has the beginnings to create a police state.

Bill 29 further cuts the power of the independent watchdog that is charged with investigating citizens' complaints. The government has fought a series of Supreme Court skirmishes with the information and Privacy Commissioner to weaken his powers. More and more records will be put out of the reach of the Commissioner, leaving court action as the only recourse.

Furthermore, according to Mr. Toby Mendel, who runs the ***International Centre for Law and Democracy*** and who is an expert on international access-to-information laws, [he] calls key changes in Bill 29 "breathtaking," and says Newfoundland and Labrador will rank lower than some Third World countries if the amendments pass. Mr. Mendel goes on to say that, "the new cabinet exception is breathtaking in its scope." He said, "I think it's one of the widest exceptions of that sort I've seen anywhere." Bill 29 expands the scope of cabinet secrecy, making whole new classes of documents off limits from public oversight. Mendel says it is like nothing he's ever seen. "The Newfoundland one, or the proposed cabinet exception, really takes it to another level," Mendel said. "I don't think I've ever seen one as broad as that. It really throws in the kitchen sink." According to Mendel, the amendments will allow cabinet ministers to keep practically anything they want secret. "What we see in other countries, and in Canada as well, is that governments often abuse those exceptions," he noted.

"And the way the thing is worded now, it's really wide open to that kind of abuse." While the government brags its laws are among the best in Canada, globally it's another story. Mendel's group says the changes in Bill 29, when implemented, would make the province's open-records laws weaker than those in Mexico, Ethiopia, Nicaragua, Bulgaria, Guatemala and Uganda.

Moreover, another group, ***Democracy Watch*** (a national non-profit, non-partisan organization, and Canada's leading citizen group advocating democratic reform, government), says the changes would allow government to limit public scrutiny, exempt more information from disclosure, and weaken enforcement of the rules. The group's founder, Duff Conacher, calls the proposed changes "dangerously undemocratic." "It goes against what the trend is across the country which is towards more openness. Instead this is towards more excessive unjustifiable and undemocratic secrecy," he said. Conacher says tighter government control on information is a recipe for corruption, waste and abuse of power.

Consequently, ***BILL 29*** *- House of Assembly* should therefore be "scrapped" completely and not even see the light of day. An all-party committee should review the new legislation every three years. Government should also better define "sensitive corporate information" that government agencies, particularly, Nalcor hides behind. In my presentation to Mr. Cummings four years ago, I recommended that the Information and **Privacy Commissioner**, Mr. Ed Ring, be given **"Order Power"**, much like a judge and in the same manner as **other**

provinces, most notable, that which has been adopted by Quebec, Ontario, British Columbia, Alberta, and Prince Edward Island. In all five provinces, the commission is empowered to make binding orders mandating compliance with the legislation, subject only to limited rights of judicial review.

Four years later I would add a few more **recommendations** for your committee to consider.

Firstly, the government of Newfoundland and Labrador should set up and staff a **single office** for the purpose of accepting all applications for access to information from the public. For example, what often happens is that an individual has to make multiple applications to several government departments and/or agencies because he/she is told that some of the information that they are seeking maybe located with the department of justice; some information may reside in the department of mines and energy; some in the department of health and community services; while other information is in the premier's office. This means that not only multiple applications are needed, but also several fees are involved that the applicant has to pay. With a single office there would be only one fee and that office would have the sole responsibility to gather all the information being sought from various government departments and agencies and forward to the applicant. This would go a long way to cut down on the frustration and expense experienced by persons seeking information.

Secondly, the application **fee** should be kept at a very modest level, say no more than **$5.00** (as is the case in Nova Scotia and also federally in Canada) plus $0.05 a page for photocopying . . . not the $115.00 that I was “ripped-off” in 2008. There should be no charge for PDF files sent electronically. PDF files sent electronically should be used exclusively where available and if the applicant has the means to receive. To prevent abuse, if more than three requests are made in a three month period, than the fee could increase to a level to discourage such behaviour.

Thirdly, the **turnaround time** (with a suggested, 95 percent compliance rate), should be, typically, no more than **10 days** unless there are extenuating circumstances.

Fourthly, the **Privacy Commissioner** should have the **final say** concerning any disputed information being released to an applicant and have final judgment on if any delay beyond 30 days is warranted, without having to go to court, subject only to limited rights of judicial review.

Fifthly, the **Privacy Commissioner** should be **appointed for** a period of **ten years** and not on a renewal, piecemeal basis every two years. I am very suspicious that a two year renewal term is no more than a ‘trap’, and, can have the effect of keeping the Privacy Commissioner at bay and on a short leash, with respect to how the government of the day can easily dismiss the Privacy Commissioner if he produces results unfavourable to the government’s political interest. We have

already seen too many examples of this with respect to the firing of other Officers of the House of Assembly, namely, the Citizen's Representative in December 2005 and the Child and Youth Advocate who received 'a lump of coal' just before Christmas in 2009: *N.L. youth advocate removed from job*; *N.L. government afraid of Neville: lawyer...*, all, of course, on former Premier Danny Williams' watch [I always wondered if she was treated with such inequality because she was from Labrador and not a part of the St. John's establishment?]. There are many other examples that can be cited: a MHA who was ousted from the Tory caucus and now sits in the Senate of Canada; another MHA and Minister of Health who quit her portfolio because of the Premier's management style and who now also sits in the Senate of Canada; a former Premier who was forced out. Other Individuals, who either lost their position with government: from the Deputy Minister of Health and Community Services (who served with distinction as a senior government executive in NL for which he was recognized with the Lieutenant Governor's Award for Excellence in Public Administration by The Institute of Public Administration of Canada); to the CEO of Eastern Health; the position of President of Memorial University of Newfoundland; and the past chair of the *C-NLOPB* who had to go to court to get his job back after an arbitration award . . . the judge said that the province's conduct was "reprehensible". The Supreme Court of NL ruled on August 7th, 2006 that the individual has been the de facto chair of the C-NLOPB since 2005: *Ruelokke v Newfoundland and Labrador*. The response from the Premier was that the *Judge was 'over the top'*, to which the Canadian Bar Association indicated that the

Premier's comments on the judge were inappropriate and he should not have criticized a Supreme Court judge over a decision that went against his government. But, the Premier refused to *apologize for criticizing the judge* who ruled against his government. In an environment like that, I would strongly suggest [emphasis added] that the Privacy Commissioner might need someone to 'watch his back' if he only has a two year appointment.

It is interesting to observe that the Privacy Commissioner, was, initially, completely satisfied with the Cummings Report: *Review of the Access to Information and Protection of Privacy*, but now in his presentation to you on *June 24, 2014 - 1*, he would like to see changes. Why I wonder? Anything to do with the possibility that his two year appointment might not get renewed if he spoke contrary minded?

Also, interesting to note that the 80-page review by Cummings which contains 33 recommendations, appears to be now, conveniently, removed from the government of Newfoundland and Labrador's website: *http://www.justice.gov.nl.ca/just/publications/ATIPPA_Review_Report.pdf*. Why is this I wonder? Anything to do with their poor polling number in recent months?

In January 2011, the Minister of Justice proclaimed, *I welcome this review of this province's Access to Information and Protection of Privacy Act and look forward to reviewing the observations and recommendations of Mr. Cummings. The*

cornerstone of the ATIPPA is openness, transparency and accountability, and our government is committed to this important piece of legislation. The completion of this review fulfills a key piece of our ATIPPA . . . what a pile of 'bologna' that was!

Danny Williams running a 'dictatorship': Minister Loyola Hearn

Fisheries and Oceans Minister Loyola Hearn speaks with CTV News on Friday, September 5th, 2008.

Ten point commitment and general drafting instructions for Newfoundland's & Labrador's Information Commissioner:

1. Independence from Minister's Offices, no involvement in the process

2. Protect peoples personal information

3. Timely responses to those requesting information

4. All Government agencies and Crown Corporation fall under and must comply

5. All major agreements with government open for members of the public

6. Can not hide behind "corporate sensitive information"

7. Cabinet has to make all orders in Council public in a timely manner

8. Protect Cabinet confidences but limit cabinet exceptions

9. Ensure that all Ministers and there offices are open to access requests

10. All party committee to review legislation every three years

Submission to: Public Consultation for *Access to Information and Protection of Privacy Act* Review

Mr. John Cummings, Q.C.

(Commissioner for the Statutory Review of the *Access to Information and Protection of Privacy Act*)

Department of Justice

P. O. Box 8700

St. John's, NL

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Submitted by: Terry W. Burry

[redacted] Section 30

Glovertown, NL

A0G 2L0

Deadline for submission: June 30th, 2010

This Submission is a follow up from the public consultation session: **to review the *Access to Information and Protection of Privacy Act* (ATIPPA) that was held in Gander** on Monday, May 31st, 2010 at Hotel Gander. Present were: Mr. John Cummings, Q.C., Commissioner, and Ms. Jennifer Berlin, Solicitor, Department of Justice, Civil Division.

March 17th, 2010: *Commissioner Appointed for Review of Access to Information and Protection of Privacy Act*

May 7th, 2010: *Commissioner for the Statutory Review of the Access to Information and Protection of Privacy Act - Public Advisory: Public Consultation Dates for Access to Information and Protection of Privacy Act Review Announced*

First of all it was very disappointing to see that I was the only person to show up to this session in Gander. And secondly, in my opinion, the presence of a solicitor from the Department of Justice, assisting you and on the team constitutes a conflict of interest. Mr. Cummings, you sir, should have access to a solicitor from the private bar to assist in this work. According to our records, Ms. Berlin was a Director (on the other side of our application) involved with ATIPPA as per our contact in November 2008.

Section 30

From: *Terry and [redacted] Burry [redacted]* Section 30
Sent: *November 7, 2008 2:56 PM*
To: *'jenniferberlin@gov.nl.ca'*
Cc: *'commissioner@oipc.nl.ca'; 'danpeyton@oipc.nl.ca'; 'seanmurray@gov.nl.ca'; 'ering@gov.nl.ca'*
Subject: *ATIPPA*

BERLIN, JENNIFER
DIRECTOR
729-7939
FAX 729-5466
E-Mail: jenniferberlin@gov.nl.ca
JUSTICE

Attached, please find an application for ATIPPA.

Yours truly,

Terry Burry

Section 30

From: *Berlin, Jennifer [mailto:jenniferberlin@gov.nl.ca]*
Sent: *November 27, 2008 8:48 AM*
To: *Terry and [redacted] Burry*
Subject: *Out of Office Auto Reply: ATIPPA*

I will be away from the office until Tuesday, December 2nd, 2008. Should your matter require immediate attention please contact my assistant, Ruth, at 729.1174

This government through its spokesperson, The Honourable Felix Collins, Minister of Justice and Attorney General, announced on March 17th, 2010: *our government is committed to openness and accountability and the "Access to Information and Protection of Privacy Act" is a critical function of this commitment, along with being an important protection and access tool for the public.*

Just recently, on May 21st, 2010, I received a letter (see "Appendix A") from Minister Collins, in which he indicated that no changes are warranted to section 76 of the *Law Society Act, 1999,* and Rule 5.07(1) of the *Rules of the Supreme Court, 1986.* Minister Collins' words ring rather hollow, re: his government's commitment to access, openness and accountability.

It seems somewhat hypercritical and ironic; on the one hand, that ATIPPA, which was proclaimed in 2005, is mandated for a review within five years; while the *Law Society Act* was last updated in 1999, and the *Rules of the Supreme Court* dates back to 1986.

The purpose of my attending the Gander meeting was to bring to your attention two encounters that I personally experienced with request under ATIPPA.

One request was to Eastern Health in relation to our statement of claim 2007 01 T 4501. In this request, first of all, it was very difficult to identify the correct person and where the office was located. See: "Appendix B" for email correspondence with Marian Crowley of Eastern Health.

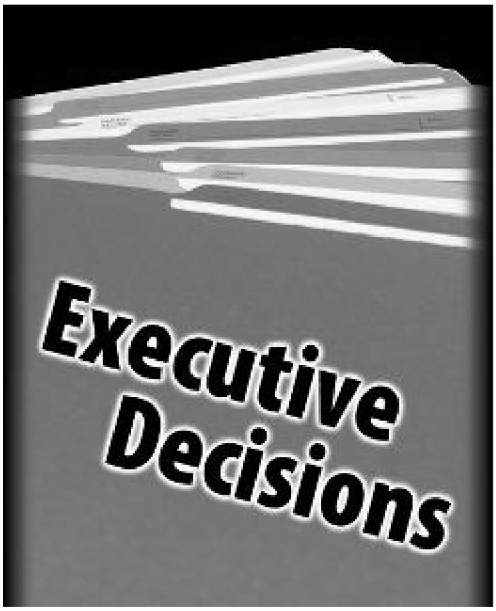
The other request was in relation to my Originating Application, re: 2008 05 T 0128, and PUBLIC SERVICE COMMISSION (GOVERNMENT OF NEWFOUNDLAND AND LABAROR), RESPONDENT. In both cases I found the process very frustrating, adversarial and in some cases I was treated rather arrogantly. This was particularly acute, in the latter case. I had to make several requests: to the Premier's Office, Executive Council, Justice, Natural Resources; plus dealing with the Office of the Information and Privacy Commissioner at the same time. After

getting the run-around, it became quite obvious that I would not be getting all the information that I was requesting. Subsequently, I discontinued my application 2008 05 T 0128. See: "Appendix C" – email correspondence and a letter from Jenifer Crummey, Executive Council, Access and Privacy Coordinator (A) with an estimate fee schedule of $155.

As I pointed out during my oral presentation, the situation with this government in relation to ATIPPA – all is not well. Reference is made to:

LOCAL NEWS ***ROB ANTLE****, The Telegram, December 6th, 2008.*

Last updated at 9:29 AM on 06/12/08
http://www.thetelegram.com/index.cfm?sid=197918&sc=79



Executive decisions

The premier's branch of the civil service has been quietly involved in vetting responses under the province's freedom of information laws, directing other public bodies to keep information secret.

But in 2002, then-Opposition Leader Danny Williams pushed for strengthened access-to-information laws during debate in the House of Assembly, calling for more "teeth" and shorter timelines for disputes to be resolved.

Danny Williams

Telegram, Monday, December 8th, 2008: ***Williams wanted secrecy appeals speeded up in 2002***

7 Process now drags out; Tories haven't moved to stem delays

But the Williams government has not followed through on those proposals, which were rejected by the Liberal administration of the day. See: "Appendix D".

In light of these issues, the Provinces' Privacy Commissioner, Mr. Edward Ring, went to the media (possibly out of desperation) on July 8th, 2008 to declare:

Go to court or be satisfied, Ring says - Transparency *If you don't go to court to access government records, you must be happy with the decision to deny you the information, the province's privacy commissioner says* – See: "Appendix E".

And to add insult to injury, on March 13th, 2009, The Attorney General of Newfoundland and Labrador took The Information and Privacy Commissioner, Mr. Edward Ring, to The Supreme Court, re: 2009 01 T 0704.

2010-02-03 *Newfoundland and Labrador (Attorney General) v. Newfoundland and Labrador (Information and Privacy Commissioner), 2010 NLTD 19 (CanLII)* – See: "Appendix F".

All the while, Mr. Ring was having issues, on a personal level, to deal with in the Courts in relation to service to his Country during his time in the Canadian Forces:

2009-03-24 *Ring v. Attorney General of Canada, 2009 NLTD 39 (CanLII)*
– *See*: "Appendix G".

In Conclusion, this government has had many issues (often of its own creation) with its Officers of The House of Assembly:

a) The firing of Darlene Neville as Child and Youth Advocate, in December 2009:

House fires Neville

The Telegram, Newfoundland, Canada - Tuesday, Dec. 22, 2009
The House of Assembly closed for its Christmas break Monday, but not before giving Darlene Neville a proverbial lump of coal. MHAs voted along...

The Telegram - St. John's, NL: Local News | House fires Neville
22 Dec 2009 ... After the vote, Neville and her lawyer Bern Coffey spoke to reporters in the Lobby of Confederation Building. ...

b) Issues with the temporary replacement, Child and Youth Advocate, John Rorke:

Advocate muzzled: Liberals

The Opposition accused the Williams government of muzzling acting Child and Youth Advocate John Rorke during question period Monday. Talking to reporters outside the House, Opposition...

Rorke free to speak: Kennedy…
The report was looking into an incident where two young people had to be transferred from the Janeway to the Waterford Hospital - they were handcuffed and escorted by RNC officers. Jones...

DOCUMENT: Read the full text of John Rorke's report

Strong language from judge okay: *it depends on whose soul is being saved, obviously. "Lawyer defends judge" The Telegram (St. John's) Thursday, October 14, 1999 Page: 1 / FRONT Section: News By line: Bonnie Belec The Telegram A provincial court judge who was reprimanded by Newfoundland's Judicial Council shouldn't have had to go before the council in the first place, says veteran St. John's lawyer, Danny Williams.*

c) The Citizens' Representative, Barry Fleming, is in conflict of interest, his wife is the Chief Operating Officer (COO) of Eastern Health. See: "Appendix H": 2009 05 T 0067.

It is therefore, recommended that the Information and Privacy Commissioner be given **"Order Power"**, much like a Judge and in the same manner as other provinces, most notable, that which has been adopted by Quebec, Ontario, British Columbia, Alberta, and Prince Edward Island. In all five provinces, the commission is empowered to make binding orders mandating compliance with the legislation, subject only to limited rights of judicial review.