

Oral Submissions of  
**CBC/Radio-Canada**

August 18, 2014

“Check Against Delivery”

Good afternoon Mr. Chair and Committee members. The Canadian Broadcasting Corporation/Radio-Canada is pleased to be here today to make submissions on what it feels are very troubling amendments to the province's Access to Information and Protection of Privacy Act.

My name is Sean Moreman, and I am Senior Legal Counsel with CBC. With me today is Peter Gullage who is the Executive Producer responsible for news in Newfoundland and Labrador. Today, we wish to convey to you our position that the amendments to ATIPPA made as a result of Bill 29 are antithetical to the very purpose of the act itself, and how they are not in keeping with decades of court decisions favouring openness over secrecy. Peter will then discuss how these changes have helped prevent the media from doing its job of informing the public on matters of public importance.

[Sean]

In preparing for today's hearing, we have had the opportunity to review both the overall access legislation in the province and, obviously, the changes enacted two years ago by Bill 29. We have also looked at the access laws in the other provinces and territories and that of the federal government. Lastly, we've read the Cummings Report on which the government purported to base many of the Bill 29 amendments. What we found most surprising is that after that review, it became apparent the most shocking changes enacted two years ago were either NOT contained in the Cummings report, do not appear in any other Canadian jurisdiction, or both.

In particular, sections 2 and 3 of Bill 29 removed certain records entirely from being subject to the act, whereas before they could have been withheld under existing discretionary exemptions. This distinction is important, as well as dangerous.

For clarity, section 2 of the Bill has excluded investigative materials of the RNC entirely from the Act, and section 3 did the same for Ministerial Briefing notes. Since “cabinet confidences” are still covered by a mandatory exemption under section 18 of the Act, we assume the records intended to be captured by section 3 are much broader in scope.

The preamble to Bill 29 stated that one of the objectives of the amendments was to [quote] “clarify” the right of access does not extend to briefing materials. It is our position this is not at all a clarification of a vague aspect of the previous law, but in fact brand new law that drastically modifies the process as it relates to those records.

Neither briefing materials nor RNC investigative records were automatically available upon request under the prior legislation; each type was already covered under exemptions in the previous version of the Act. Investigative matters were covered under section 22; and ministerial briefing notes formed part of “advice” contained in section 20 of ATIPPA. Both of these exemptions are discretionary, saying the public body [quote] “may withhold records”.

Since its decision in *Baker*, the Supreme Court of Canada has long viewed that any discretionary act undertaken by government must be done in a manner that is consistent with the purpose of the legislation that confers the discretion.

The Court has also examined access to information legislation in several cases. Time and time again, it has found that the primary purpose of these laws is to allow members of the public the opportunity to review the actions of their government in an open and transparent way to permit them to make informed opinions on those actions. Furthermore, the courts have routinely said that any restrictions on the right of access should be viewed narrowly and applied sparingly.

This philosophy is iterated in the Newfoundland and Labrador act as well, both pre- and post-Bill 29. Section 3 of ATIPPA clearly states that “The purposes of this Act are to make public bodies more accountable to the public...” by “giving the public a right of access to records” and “specifying limited exceptions to the right of access.”

In examining what factors are to be considered in exercising the discretion to withhold information, the Supreme Court in *Blank* has also stated that any discretionary provision in access to information legislation requires the public body to evaluate whether it is in the public interest to do so. The reason for this analysis is in order to encourage the government to disclose more information rather than less.

Based on the principles outlined by the Supreme Court of Canada, the analysis of whether records should be disclosed to a requester under discretionary exemptions

must follow a two-step process. This is what I refer to as the “could/should” analysis. Firstly, “could” the government body withhold the records, meaning is it the type of record described in the act, and has the public body met the evidentiary burden to withhold it? If the answer is yes, then one moves the second prong of the test to to ask, “should the government withhold the record after balancing the purpose of the legislation against the public interest in receiving the information it contains?”

As a result, by removing these records entirely from the application of ATIPPA, the government is absolving itself of the responsibility to explain why it is in the public interest to withhold the records in question. That is entirely contrary to the very principle of accountability that the act says it is trying to achieve.

It is interesting to note that none of the provinces, or the federal Access to Information Act, excludes these types of records entirely from their applicable legislation. Newfoundland and Labrador stands alone in that regard.

And given that the government already had the discretion to withhold the records if it is in the public interest to do so, we question what particular harm is being remedied by placing an absolute bar to access over them with these amendments.

It is also interesting to note that the Cummings report did not recommend these changes. In fact, it recommended against what was contained in Bill 29. However, what was in the Cummings report may shed some light on the present government’s view of ATIPPA’s mandate of providing accountability.

In particular, when discussing the idea of “cabinet confidences” at page 38, the report quotes the Executive Council as favouring greater quote-unquote protection from disclosure. This idea of “protection” seems to suggest the government feels it is under attack, or at the very least being threatened by public scrutiny. But, it cannot be overstated, the act is not called the “Protection of Government Documents Act”, it is the Access to Information Act; its very purpose is to make government accountable, no matter how uncomfortable that might get at times.

[Peter]

As Sean said, the idea of public accountability is at the very core of access to information legislation. But it is also a fundamental part of what we do as media. The courts in this country have recognized that the freedom of the press guaranteed by section 2-b of the Charter includes a journalist’s ability to acquire information about public institutions and to act as the eyes and ears of the public. Without that ability, major stories would go unreported and no one would be held accountable.

I can think of several examples of issues that have been raised as a direct result of access to information requests by members of the media:

Nationally, the sponsorship scandal was first uncovered by reporters using the federal Access to Information law.

Access to information requests also played an important role in stories about excessive spending by the former premier of Alberta and other questionable

practices ... stories that led to the involvement of the auditor general, and now the police.

In this province, access to information has allowed CBC journalists to do a number of stories in the public interest.

We revealed a lack of public activity by the legislature's budget watchdog, the public accounts committee ... six years with no public meetings, with one member getting more than ten thousand dollars for attending one private meeting. The story resulted in action. The committee is now active.

Access to information allowed us to tell people that there is no ambulance on standby ready to respond to emergencies on the northeast Avalon for an average of a half-hour a day.

Access to information allowed us to tell people about a lack of safety inspections in one of the province's most dangerous industries, the fishery. The province carried out just one inspection per month. There are 6,000 commercial fishing vessels operating in this province.

Access to information allowed us to tell people about how pressure from the military resulted in marine medical distress calls in our waters being handled by a free service in Rome - a practice that changed after the first CBC reports revealed a significant language barrier.

Those are important stories, we believe. And in all cases, the Access to Information Act allowed us to report on issues of significant interest to our audience in order to enlighten them on the activities of their government. That is the very purpose of the act. Without the ability to file those requests, it is likely none of these issues would have ever seen the light of day.

But perhaps more important are the stories we can't do now, thanks in large part to changes brought in by Bill 29. The system was far from perfect before Bill 29. Now it's much worse.

To quote Donald Rumsfeld, "there are also unknown unknowns, the ones we don't know we don't know". We can't know what government is up to until we ask - unknown unknowns - and because of the changes made to ATIPPA, there is no way to find out. As a result, the public is left in the dark, and government is not made accountable for its conduct.

Putting ministerial briefing notes off-limits to the public has choked off the flow of information that led reporters to make calls to the government about possible items of public interest. If we don't know what ministers are being briefed on, we don't know what to ask about.

Bill 29 has led our reporters to file fewer ATIPPA requests, because the type of information they can get has been severely restricted. These changes have led to more information being kept from the public domain. How much more? We don't know. It's all blacked out.

I mentioned the federal sponsorship scandal as an example of a story that was revealed because of access to information. When public scrutiny is not allowed to happen, bad things often do.

Here in Newfoundland, we had the House of Assembly spending scandal. At the time, Chief Justice Derek Green attributed the scandal to a lack of access to information by the media: This is what he said:

“One of the antidotes to this lack of confidence and suspicion is to shine light into the darkness by giving access to information ... Indeed, if an access regime had been in place over the past several years, it is arguable that investigative media could have used such legislation to review Members’ allowances and spending patterns...”

As you can see from these examples, access to information legislation plays a vital role in informing the public, and in exposing government waste, corruption and other matters of fundamental public interest.

And the very nature of these stories also means there are likely to be many requests filed by many journalists on related topics, even if they are all employed by the same broadcast corporation. That is the reality of today’s media landscape where broadcasters such as the CBC create content on traditional platforms such as television and radio, as well as newer platforms such as the internet and social

media. One reporter can not do it all, and often different angles are being explored at once. Which is what made section 21 of Bill 29 particularly worrisome.

[Sean]

The exact wording of that section allows for the head of a public body to refuse to answer “one or more” requests if “one or more” of them is frivolous or vexatious, or if it decides the request is made in bad faith or is trivial. There are several problems with this provision in our opinion:

Firstly, there is no guidance in the Act on what frivolous, vexatious, bad faith or trivial mean; Secondly, an individual head of a public body who may be embarrassed by the content of records that can not otherwise be properly withheld under the act should not be empowered to simply disregard a request on vague criteria; and thirdly, the wording “one or more” allows the head to ignore all the requests by a particular requester simply because any one of them at any time is deemed to be offside.

While we understand this section of the Act has only been used seven times to date, the potential for abuse is very real. As was the case with one of our journalists in Manitoba. She filed a simple request for emails containing her own name during a four month period. In refusing the request, the City stated that her previous 52 requests on completely unrelated matters made the current requests repetitious as well as vexatious and frivolous. We have attached the refusal letter to our submissions today.

Although one can appeal the decision of the head of the public body to the Commissioner, we fear this power may be used as a stalling tactic by public bodies if the heat gets too high. As was mentioned earlier, stories grow the more we find out. And the more we find out, the more access requests we file in order to dig even deeper. It is the very journalistic process of asking more questions that a head is likely to deem “vexatious” in order to avoid further scrutiny.

[Peter]

Understanding that news has a very short shelf life, a public body can simply refuse to answer more requests on the basis they are “vexatious” knowing it will have the effect of stalling any momentum and public interest in the on-going story. In that case, the appeal to the commissioner really is illusory since it can take months to resolve. And even then, that is only to have the request considered, not necessarily to have the records released!

And this is also not what was recommended by the Cummings report. In that report, the author clearly rejected the government’s position that there should be a unilateral grant of power to the head of the public body to deal with vexatious requests. I just want to read that section into the record here from page 35:

I think it makes sense for a public body to be required to obtain the approval of the Commissioner before refusing to respond to a request on the basis that it is frivolous and vexatious.

We also would like to comment on the ability of the head of the public body to seek permission to refuse a request that the commissioner deems to be excessively broad. Section 9 of ATIPPA states that the head of a public body has the duty to assist an applicant in making a request. It is our position that this duty includes a requirement to work with the requester to narrow his or her request to make it more manageable. In that spirit, we would hope that the public bodies will only seek permission to disregard a request that is broad only after it has exhausted all reasonable means to narrow the request, and we hope the commissioner will do a thorough evaluation of those efforts prior to granting permission to refuse it.

[Sean]

To conclude, CBC/Radio-Canada has had the opportunity to review ATIPPA, and is concerned by what it views as a movement toward more government secrecy as opposed to further accountability. Three changes are particularly worrisome:

The government already had the discretionary power to withhold Ministerial briefing notes and RNC investigative records under the previous legislation. It would appear the only reasons possible for the government to want to now exclude them entirely from the Act are firstly, to avoid having to explain why withholding the records is in the public interest; and secondly, to avoid having to sever and provide the portions of the records that can not be properly withheld. In our view, neither of these reasons should be sufficient to draw the curtains shut on a process that is supposed to shine light on government operations.

As well, we are concerned about the possibility that government heads will improperly use the ability to declare requests “vexatious” in order to prevent further scrutiny. The power being granted would effectively allow the head of a public body to refuse all access requests filed by CBC simply by deeming any one of them to be vexatious. While that extreme situation does seem unlikely, it is more probable that the power will be abused in order to simply delay answering a request until there is no more interest in the story, or when it is politically expedient to do so (such as in the lead up to an election).

None of these changes was proposed in the Cummings report. In fact, it specifically recommended against what was finally passed. The government has not explained what harm it is expecting to remedy with any of these changes, and CBC/Radio-Canada believes that is because there is none. For these reasons, we urge everyone to take a very close look at the changes and the very negative effect they have on the public’s ability to keep its government accountable.

As a result, it is our respectful submission that this committee recommend the repeal of sections 2 and 3 of Bill 29, and also recommend that the Act be amended to require the head of a public body to obtain approval from the Commissioner prior to refusing a request as being vexatious or frivolous as was recommended in the Cummings report.

Subject to any questions, those are our submissions.



Office of the City Clerk – Bureau du Greffier

February 13, 2013

Joanne Levasseur  
541 Portage Avenue  
Winnipeg, MB R3B 2G1

**FIPPA Applications for Access Nos. 13 01 36, 13 01 37, 13 01 38, 13 01 39**

I am in receipt of the above-listed Applications for Access in which you request:

*Date and subject headings for all email received by Rhea Yates and Bonnie Staples-Lyon from samkatz@goldeyes.com from Aug 17, 2012 to Jan 15, 2013*

*From Aug 22, 2012 to Jan. 15, 2013, All e-mails pertaining to FIPPA requests made by Joanne Levasseur. Please search Brad Salyn's Janet Thomas and Pam Langstaff and Bill Clark's account.*

*All deleted emails in Bonnie Staples-Lyon Rhea Yates, Steve West, Phil Sheegl and Sam Katz email accounts dated between Aug 17, 2012 to Sept 30, 2012*

*All emails, with the name Levasseur from Aug 23, 2012 to Jan 15, 2013. Please search to following email accounts – Rhea Yates, Steve West, Bonnie Staples-Lyon, Phil Sheegl and Sam Katz and Brad Salyn*

In accordance with subsection 13(1) of *The Freedom of Information and Protection of Privacy Act* (FIPPA) listed below, the City of Winnipeg is disregarding these requests for access.

***Public body may disregard certain requests***

*13(1) The head of a public body may disregard a request for access if he or she is of the opinion that*

- (a) the request is incomprehensible, frivolous or vexatious;*
- (b) because of their repetitious or systematic nature, the requests would unreasonably interfere with the operations of the public body or amount to an abuse of the right to make those requests;*

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In the 2012 calendar year, you made 53 requests for information under FIPPA. Many of these were extremely broad and general in nature. To provide a few examples, you sought the following:

- All invoices from a variety of companies for the past 3 years
- All invoices from Akman Construction over three years
- Invoices from Hu's on First Restaurant and Hu's Asian Bistro for the last three years
- Last 100 founded complaints regarding bus drivers
- All polling/survey results for the last year
- All senior staff meeting minutes from October 2010 to October 2011
- All records including e-mails between Canalta Real Estate and City administration
- All records including e-mails between City administration and the Mayor's Office regarding the water park
- Investigation reports regarding bus drivers conduct with public where driver was found at fault or in violation
- Phil Sheegl Chronos File Aug 8, 2011 to Aug 21, 2012
- All invoices from Veolia
- Any and all records relating to Veolia seeking work as a contractor or subcontractor as referenced in Moira Geer's 2012 report on Veolia
- All documents relating to Taylor and Grosvenor firehalls
- Report of all property swaps from August 24, 2009 to August 24, 2012
- All emails between the CAO, FPS Chief, and Director of Planning, Property and Development related to the construction of new firehalls, from January 1, 2008 to present
- Any and all records related to determining the agent for Dominion Bridge lands
- Directives outlining/designating signing authority of CAO for the last four (4) years
- Detailed cell phone records for S. Katz and P. Sheegl for the last year
- Any and all records related to the award of the property management contract for the new Winnipeg Police Service Building at the Canada Post site
- Any and all records relating to splitting fire hall construction into four separate contracts
- Any and all emails sent between August 12, 2012 and September 12, 2012 by P. Sheegl to Steve West using his Winnix email account and by S. Katz to Rhea Yates using his Winnipeg Goldeyes email account
- Record of all expropriations in the last 5 years
- Any and all waybills listing a Scottsdale AZ address, from January 1, 2008 to September 21, 2012
- Phone bills detailing calls made from Mayor's Office / CAO's office to area code 602 for the last 3 years
- Any and all records including emails related to CAO time off from May 2011 to present
- Information pertaining to Construction Change Orders for Fire Station No. 11

*Embrace the Spirit • Vivez l'esprit*

To date, the City has responded to all of these requests. Many of these responses have absorbed a significant amount of City staff time.

The four requests which are subject of this response, continue the pattern of your requests in 2012 in that they are wide-ranging in nature and will require a significant expenditure of City employees' time to process and respond to. On average, responding to the 53 requests in 2012 is estimated to have required at least two to three hours of City staff time and some requests have taken up much more. In many cases, this time is not eligible to be charged to the applicant under FIPPA.

It is therefore the City's position that these requests are systematic and repetitious in nature and continuing to respond to them would unreasonably interfere with the operations of the City.

As these are not requests for particular documents but are rather so general that they are also frivolous and vexatious. They amount to an abuse of the right under FIPPA to make these requests.

Please note that Subsection 59(1) of *The Freedom of Information and Protection of Privacy Act* provides that you may make a complaint about this decision to the Manitoba Ombudsman. You have 60 days from the receipt of this letter to make a complaint on the prescribed form to the Manitoba Ombudsman, 750 – 500 Portage Avenue, Winnipeg, MB R3C 3X1, 204-982-9130.

Should you require further information with respect to this matter, please contact the Deputy City Clerk, Marc Lemoine, at 204-986-7131.



Section 30

R. Kachur  
City Clerk

c Ms. J. Baltessen, City Records Manager  
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