

Submission to Public Bills Committee

Bill 1

Madam Chair and Committee members, thank you for the opportunity to speak on Bill 1 this morning.

I'm going to restrict my comments to my own greatest area of concern, which is the Freedom of Information and Protection of Privacy regime in Nova Scotia, as manifest in Part XX of the *Municipal Government Act*, imported into the HRM *Charter*. I'll use the MGA's term "Responsible Officer," because it's more descriptive than the word "Head" in the provincial Act. Where I refer to Part XX, please just extrapolate to the provincial Act. You'll also find relevant statutory provisions attached to this submission.

Bill 1 clauses 16 - 21 and 31 - 34 provide various grounds for rejecting access requests, privacy complaints, and review requests, most of which involve the public entity's unilateral assessment of the requestor's state of mind and motivation. Clause 67 makes these powers retroactive, allowing the dismissal of requests currently queued and awaiting the attention of the OIPC.

I have no doubt people make repetitive, frivolous and vexatious requests, but if public entities will now have latitude to decide whether to answer those requests and even to determine the "good faith" of the requestor, they must exercise this expanded power in good faith.

Sadly, the Bill 1 amendments as they stand will make the Review Office busier than ever, reviewing rejections of public requests.

The Premier is tired of problem stretchers. So am I.

Bill 1 as it stands is a problem-stretcher's dream. I'd like to propose two amendments which I believe would go a long way to protecting public accountability, while limiting the number of FOIPOP requests made.

AFFIDAVIT

It's generally accepted, and international and domestic courts have repeatedly found access to information to be integral to freedom of expression, as guaranteed in the UN Charter of Human Rights after the Second World War, and later in Canada's own *Charter of Rights and Freedoms*.

So any FOIPOP request is serious, and needs to be treated that way. Most never find their way to court, but potentially, any request can end up in court, where truthfulness actually is required. At that late date, in the Court is the wrong stage for the whole process to fall apart because nobody is willing to swear to the completeness and candour of the official response.

The way to stop such exercises dead in their tracks would be to require the sworn statement of the statutorily designated responsible officer at the outset that he or she has made best efforts to understand and respond to the request “openly, accurately and completely,”

When a Responsible Officer gambles on a request never getting to court, he or she is squandering not only time and money, but also public trust.

Why not require the personal oath of the Responsible Officer in the first place?

The required affidavit should attest that the statutorily defined Responsible Officer has made best efforts to do two things.

(1) Understand the request

Any doubt about the scope of a question should be clarified with the person asking, not the person answering. Most requestors want records, and don't care which drawer they're kept in.

HRM's Responsible Officer regularly withholds records as “non-responsive”, based on where they are located, rather than what they contain. This is apparently a useful tactic when there is no chance of applying any of the legislatively authorized exemptions, but it only works if the responsible officer can avoid clarifying with to the requestor.

The public has no way of knowing the intricacies of internal information storage systems, (or even that certain systems exist, such as HRM's Hansen). Exploiting this inherent disadvantage to run a shell game is guaranteed to multiply FOIPOP requests.

(2) Open, accurate and complete search and disclosure

Any municipality's Responsible Officer is statutorily responsible for records of the entire municipal enterprise, including any "municipal body", ie any entity whose board is mostly or entirely appointed by the municipal Council.

That Officer should be required to swear that he or she has disclosed the existence and content of all responsive records, (ie "all municipal information with necessary exemptions, that are limited and specific"), and is not aware of such records elsewhere.

This would eliminate the possibility of a Responsible Officer, having refused to conduct an integrated search, failing to disclose the existence of records held by a municipal like the Halifax Regional Police or Halifax Water.

An affidavit of complete and candid search and disclosure would prevent Responsible Officers from arbitrarily fragmenting access requests and would enormously relieve the burden on the review office.

SANCTIONS

Current sanctions in the FOIPOP regime are insufficient, and should be strengthened to reflect the gravity of the Responsible Officer's duties.

Failure to fulfil those duties is deeply corrosive. It can involve major infringements of individuals' personal privacy, allowing racism, prejudice and other abuses to flourish in official darkness, and on occasion can be tantamount to obstruction of justice.

I'm speaking from 11 years of experience, beginning some time after HRM's processing and 2013 approval of the subdivision of land traversed by the deeded, registered, migrated and longstanding right-of-way to our home, without ever speaking to us.

Months after the subdivision was approved and registered without our involvement, we were suddenly threatened with litigation by the developer if we wouldn't immediately deed over our right-of-way across a parcel of land, by then owned by HRM in the theoretically complete subdivision.

It emerged that our-right-of-way had been removed from the registered plan conveying land to HRM, and had been replaced by something legally very different. The registered plan was amended to correct misrepresentations of our own property and title, but we have been subject to significant harassment ever since, as if the first registered plan had never been corrected.

HRM has steadfastly refused to explain the point of all this, and we were driven to the FOIPOP process. Through this, we learned that HRM was fully aware of the misrepresentations when it placed the first plan in the Land Registry.

Years later we learned that while participating in litigation, ostensibly as a defendant, HRM had taken a “non-expiring” letter of credit from the developer to guarantee the delivery of our right-of-way to HRM— without our knowledge or consent.

Another inaccurate conveyance, this one to Halifax Water emerged more recently, which seems to be the source of a different, more recent set of aggressions toward us, and we have no idea whether yet another third party’s financial guarantee to deliver our title still hangs over our heads, without our knowledge.

The Municipality has never agreed to tell us the point of all this activity, but the FOIPOP process itself has been enlightening, and it has been disturbing to see what ornate manoeuvres HRM has gone through to evade disclosure of certain records, including those of Regional Council itself.

This should never have happened, and I never want it to happen to anyone else in this province.

Intentionally or not, Bill 1 as it stands sends the message that citizens are mostly a nuisance. If Bill 1 is to allow public entities to dismiss requests out of hand, please ensure there are countervailing safeguards for the public.

So in hopes that you'll consider adding the requirement for the responsible officer's affidavit when first responding to a public request, and strengthening sanctions for failing in the duty to assist, I'll close, and will be happy to answer any questions.

Thank you all very much.

Michele H, Raymond

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Interpretation
461 In this Part,

(d) "municipal body" means a committee, community council, agency, authority, board or commission, whether incorporated or not

(i) a majority of the members of which are appointed by,

or

(ii) which is under the authority of,

one or more municipalities;

(e) "municipality" means a regional municipality, town, county or district municipality, village, service commission or municipal body;

(i) "responsible officer" means, in the case of a

(i) regional municipality, town or county or district municipality, the chief administrative officer, if one has been appointed or, if one has not been appointed, the clerk,

(ii) village or service commission, the clerk,

(iii) municipal body

(A) a majority of the members of which are appointed by one municipality, the responsible officer for the appointing municipality,

(B) which is under the authority of one municipality, the responsible officer for that municipality, or

(C) which is not described in paragraph (A) or (B), the chair or presiding officer;

(k) "third party", in relation to a request for access to a record or for correction of personal information, means any person, group of persons or organization other than

(i) the person who made the request,

(ii) the municipality to which the request is made, or

(iii) a municipal body, a majority of the members of which are appointed by, or which is under the authority of, the municipality to which the request is made;

(f) "personal information" means recorded information about an identifiable individual, including

(i) the individual's name, address or telephone number,

(ii) the individual's race, national or ethnic origin, colour, or religious or political beliefs or associations,

(iii) the individual's age, sex, sexual orientation, marital status or family status,

(iv) an identifying number, symbol or other particular assigned to the individual,

(v) the individual's fingerprints, blood type or inheritable characteristics,

(vi) information about the individual's health-care history, including a physical or mental disability,

(vii) information about the individual's educational, financial, criminal or employment history,

(viii) anyone else's opinions about the individual, and

(ix) the individual's personal views or opinions, except if they are about someone else;

Duty of responsible officer

467 (1) Where a request is made pursuant to this Part for access to a record, the responsible officer shall

(a) make every reasonable effort to assist the applicant and to respond without delay to the applicant openly, accurately and completely; and

(b) consider the request and give written notice to the applicant of the decision with respect to the request.

Purpose of Part

462 The purpose of this Part is to

- (a) ensure that municipalities are fully accountable to the public by
 - (i) giving the public a right of access to records,
 - (ii) giving individuals a right of access to, and a right to correction of, personal information about themselves,
 - (iii) specifying limited exceptions to the rights of access,
 - (iv) preventing the unauthorized collection, use or disclosure of personal information by municipalities, and
 - (v) providing for an independent review of decisions made pursuant to this Part;
- (b) provide for the disclosure of all municipal information with necessary exceptions, that are limited and specific, in order to
 - (i) facilitate informed public participation in policy formulation,
 - (ii) ensure fairness in government decision-making, and
 - (iii) permit the airing and reconciliation of divergent views; and
- (c) protect the privacy of individuals with respect to personal information about themselves held by municipalities and to provide individuals with a right of access to that information. 1998, c. 18, s. 462.

Right of access and restriction

465 (1) A person has a right of access to any record in the custody, or under the control, of a municipality upon making a request as provided in this Part.

(2) The right of access to a record does not extend to information exempted from disclosure pursuant to this Part but, if that information can reasonably be severed from the record, an applicant has the right of access to the remainder of the record.

Fraudulent registration of title

386. Every one who, as principal or agent, in a proceeding to register title to real property, or in a transaction relating to real property that is or is proposed to be registered, knowingly and with intent to deceive,

- (a) makes a material false statement or representation,
 - (b) suppresses or conceals from a judge or registrar, or any person employed by or assisting the registrar, any material document, fact, matter or information, or
 - (c) is privy to anything mentioned in paragraph (a) or (b),
- is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

R.S., c. C-34, s. 344.

Destroying documents of title

340. Every one who, for a fraudulent purpose, destroys, cancels, conceals or obliterates

- (a) a document of title to goods or lands,
 - (b) a valuable security or testamentary instrument, or
 - (c) a judicial or official document,
- is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

Forgery

366. (1) Every one commits forgery who makes a false document, knowing it to be false, with intent

- (a) that it should in any way be used or acted on as genuine, to the prejudice of any one whether within Canada or not; or
- (b) that a person should be induced, by the belief that it is genuine, to do or to refrain from doing anything, whether within Canada or not.

Making false document

(2) Making a false document includes

- (a) altering a genuine document in any material part,
- (b) making a material addition to a genuine document or adding to it a false date, attestation, seal or other thing that is material; or
- (c) making a material alteration in a genuine document by erasure, obliteration, removal or in any other way.

When forgery complete

(3) Forgery is complete as soon as a document is made with the knowledge and intent referred to in subsection (1), notwithstanding that the person who makes it does not intend that any particular person should use or act on it as genuine or be induced, by the belief that it is genuine, to do or refrain from doing anything.

Forgery complete though document incomplete

(4) Forgery is complete notwithstanding that the false document is incomplete or does not purport to be a document that is binding in law, if it is such as to indicate that it was intended to be acted on as genuine.

Exception

(5) No person commits forgery by reason only that the person, in good faith, makes a false document at the request of a police force, the Canadian Forces or a department or agency of the

federal government or of a provincial government.

Use, trafficking or possession of forged document

368. (1) Everyone commits an offence who, knowing or believing that a document is forged,

- (a) uses, deals with or acts on it as if it were genuine;
- (b) causes or attempts to cause any person to use, deal with or act on it as if it were genuine;
- (c) transfers, sells or offers to sell it or makes it available, to any person, knowing that or being reckless as to whether an offence will be committed under paragraph (a) or (b); or
- (d) possesses it with intent to commit an offence under any of paragraphs (a) to (c).

Punishment

(1) Everyone who commits an offence under subsection (1)

- (a) is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years; or
- (b) is guilty of an offence punishable on summary conviction.

Wherever forged

(2) For the purposes of proceedings under this section, the place where a document was forged is not material.

Books and documents

397. (1) Every one who, with intent to defraud,

- (a) destroys, mutilates, alters, falsifies or makes a false entry in, or
- (b) omits a material particular from, or alters a material particular in, a book, paper, writing, valuable security or document is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

Privity

(2) Every one who, with intent to defraud his creditors, is privy to the commission of an offence under subsection (1) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

R.S., c. C-34, s. 355.

Fraud

380. (1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,

- (a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars; or
- (b) is guilty
- (i) of an indictable offence and is liable to imprisonment for a term not exceeding two years; or
- (ii) of an offence punishable on summary conviction, where the value of the subject-matter of the offence does not exceed five thousand dollars.

Minimum punishment

(1.1) When a person is prosecuted on indictment and convicted of one or more offences

referred to in subsection (1), the court that imposes the sentence shall impose a minimum punishment of imprisonment for a term of two years if the total value of the subject-matter of the offences exceeds one million dollars.

Affecting public market

(2) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, with intent to defraud, affects the public market price of stocks, shares, merchandise or anything that is offered for sale to the public is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Obstruction of justice

139. (2) Every one who wilfully attempts in any manner other than a manner described in subsection (1) to obstruct, pervert or defeat the course of justice is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.