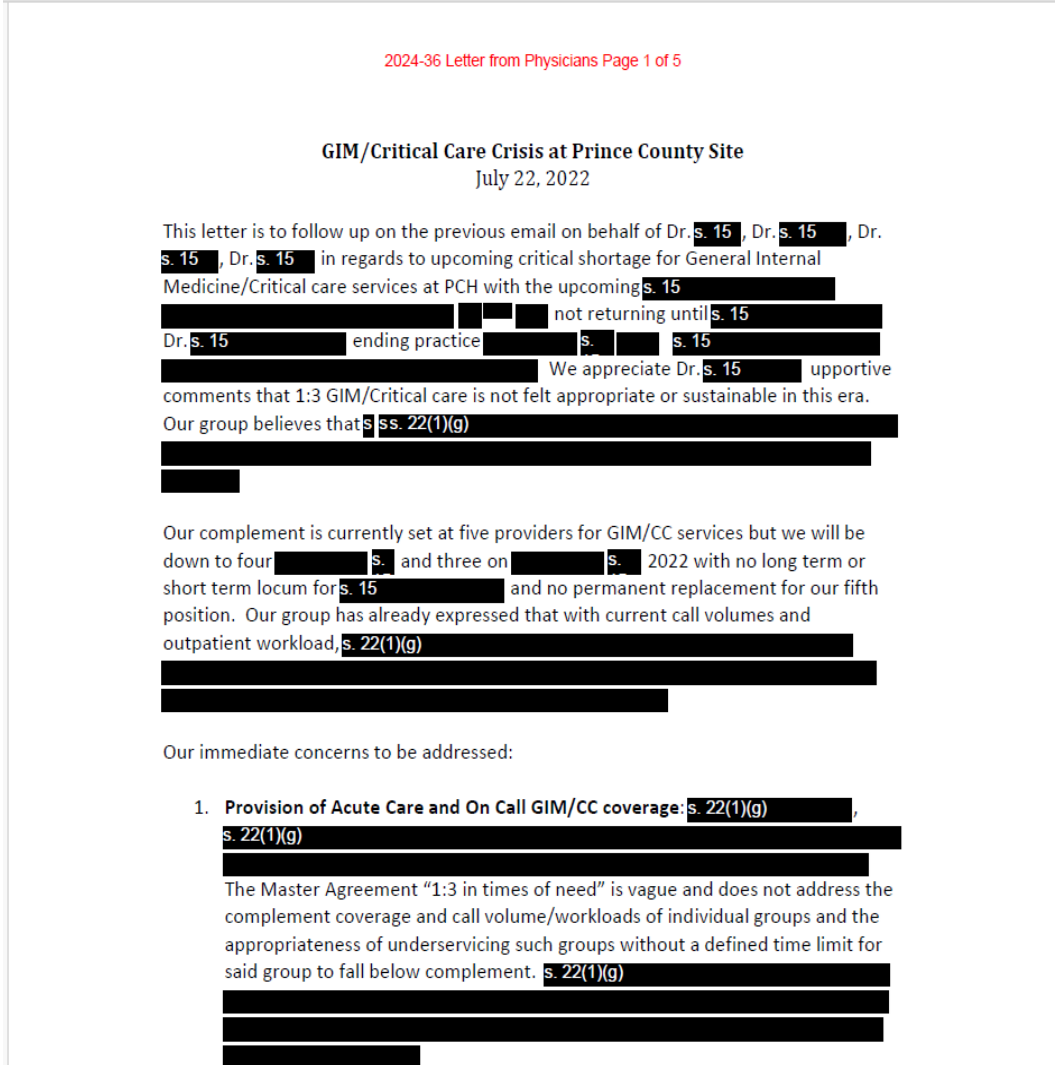
Lead or Continue Lagging

The case for strengthening public interest access provisions in P.E.I.'s Freedom of Information regime



2024-36 Letter from Physicians Page 1 of 5

GIM/Critical Care Crisis at Prince County Site
July 22, 2022

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Who am I?

- Stu Neatby, Member of the P.E.I. Press Gallery
- Legislative reporter at The Guardian
- Moderate-to-frequent flyer of P.E.I.'s Freedom of Information system

What's at Stake here?

- Freedom of Information laws are a fundamental tool for journalists, businesses and members of the public who have a right to know what public bodies are doing.
- Freedom of Information is also a crucial tool to hold these public bodies to account
- With perhaps one exception, federal and provincial Freedom of Information regimes have come to lag behind our democratic peers

Access to Information has been described as:

- "A fundamental human right" and "the touchstone of all the freedom to which the United Nations is consecrated." (UN General Assembly, 1946)
- "Essential for informed public discourse on which democracy depends" (Centre for Free Expression)
- "The oxygen of democracy" (Secret Canada, Globe and Mail investigation)

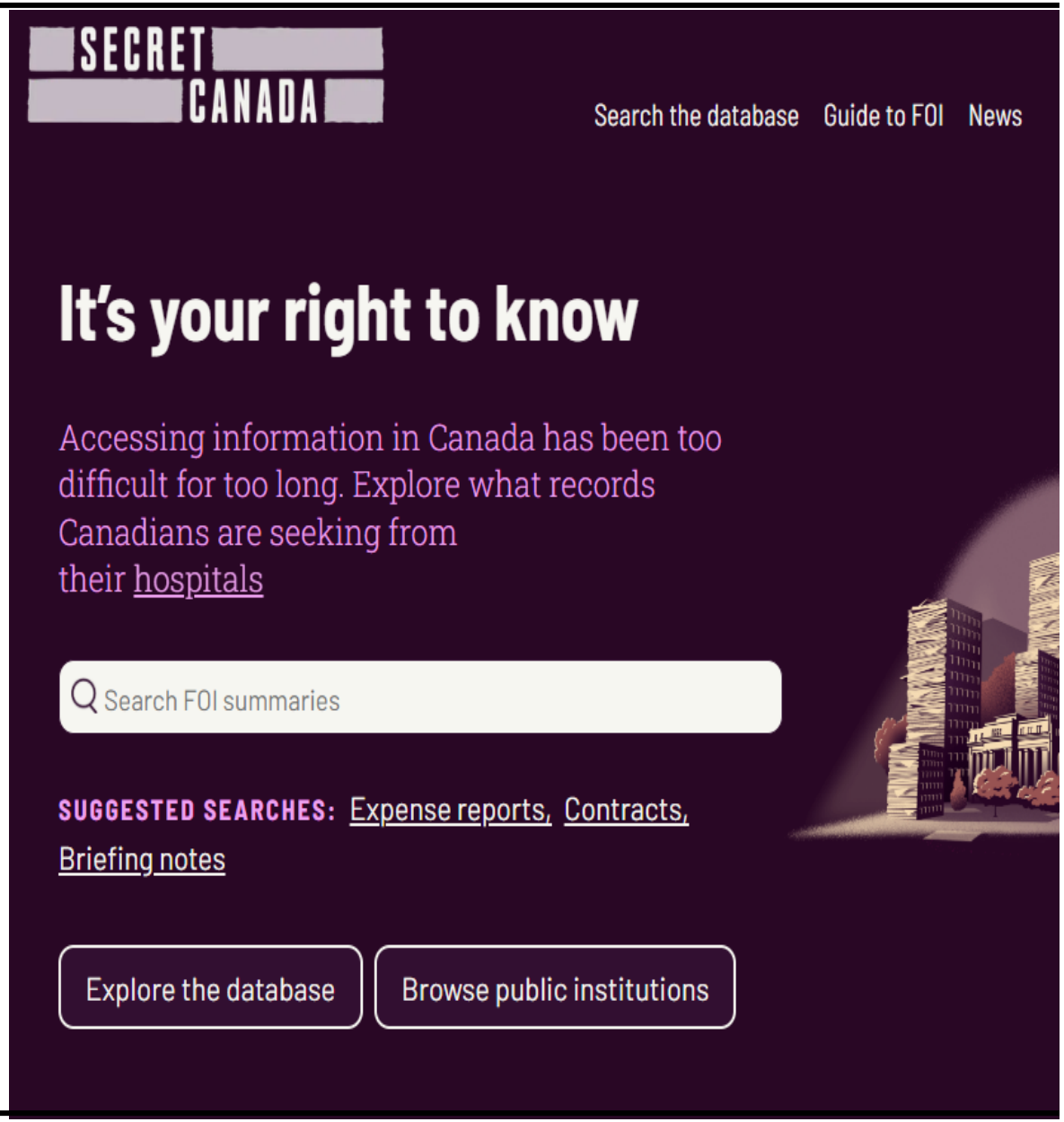
What's the Problem?

"Across the country, FOI units have been starved of resources and staff. Institutions can no longer meet their statutory deadlines. The laws themselves are impractical in a digital world. And it is normal for institutions to refuse to release records that judges and adjudicators have repeatedly said are public, such as government contracts.

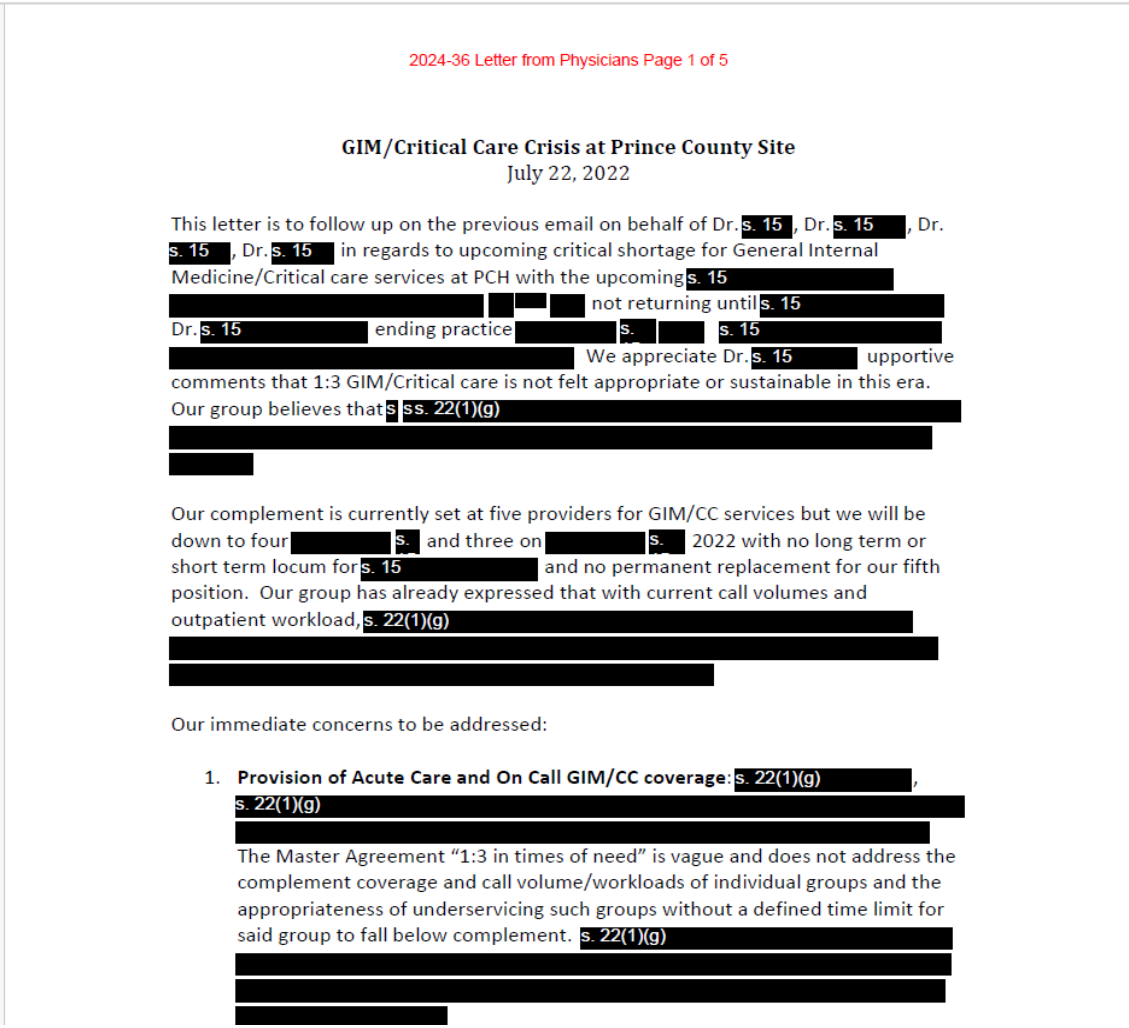
Meanwhile, public servants are regularly advised by their superiors to withhold information – even if the legislation permits its release – to avoid risk or embarrassment.

Exacerbating the problem is the fact that, in the Canadian system, there are few to no consequences for breaking access laws. As a result, institutions are denying the public access to its own information as a matter of routine."

- 'How Canada's FOI system broke under its own weight." Globe and Mail, June 9, 2023



A user's guide to P.E.I.'s FOIPP system:



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Some things work well

- APSO staff are knowledgeable and, in my experience, fulfil "duty to assist"
- P.E.I.'s Information and Privacy Commissioner has the power to compel disclosure of records. This is not the case in Saskatchewan, Nova Scotia, New Brunswick, Yukon or Nunavut
- Section 15 (2)(f): Explicitly makes clear disclosure applies to financial details of government contracts that provide goods, services to a public body
    - This provision is not always followed (eg: NHL Contract)

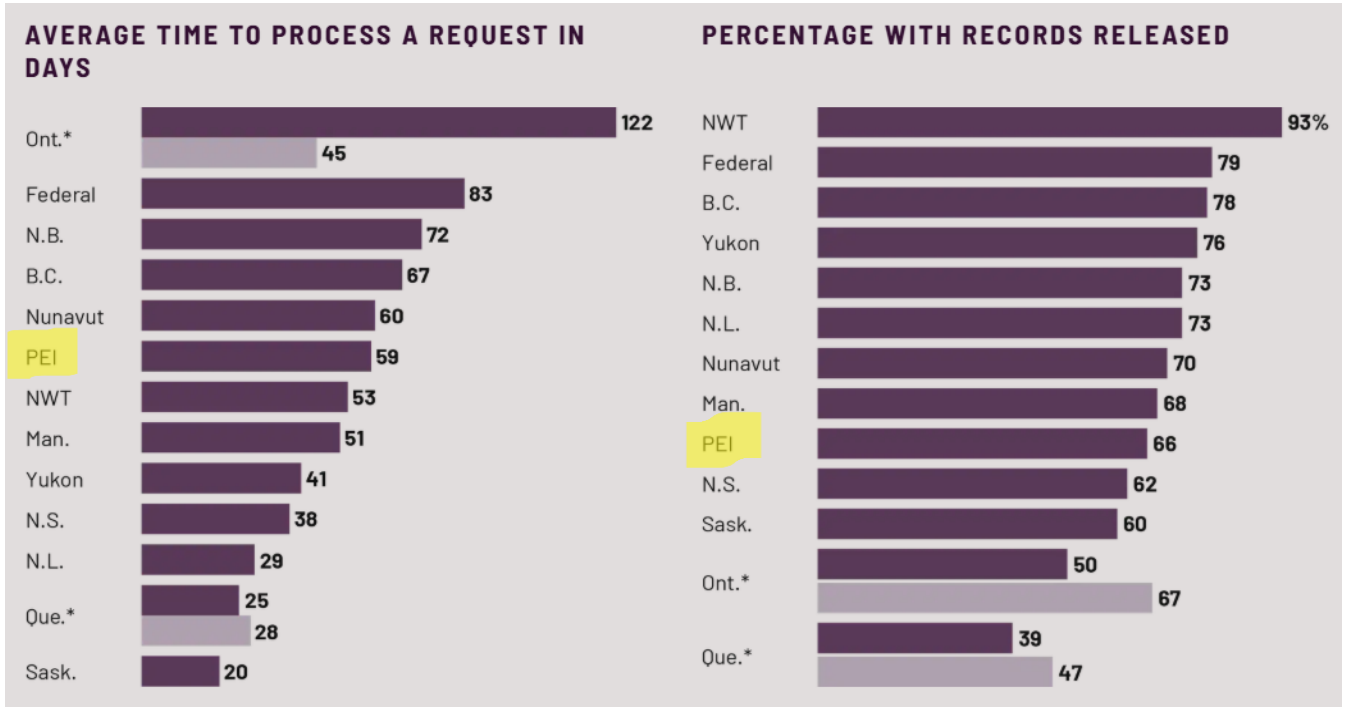
P.E.I. is in the middle of the pack in terms of access, timelines and legislation. But that should hardly be an accomplishment

CENTRE FOR LAW AND DEMOCRACY

Canadian Access to Information Legislation Score sheets in Full

1. Newfoundland and Labrador: 111 (updated 2015)
2. British Columbia: 94 (updated 2022)
3. Manitoba: 94
4. Canada (national law): 93
5. Yukon: 91
6. Prince Edward Island: 90
7. Ontario: 89
8. Nova Scotia: 86
9. Northwest Territories: 82
10. Nunavut: 82
11. Quebec: 81
12. Saskatchewan: 80
13. Alberta: 79
13. New Brunswick: 79

SECRET CANADA



The Problems

1. Timelines for access are needlessly long
2. Public bodies impose fees, sometimes without regard for public interest
3. Redactions are applied too broadly
4. OIPC backlogs produce timelines that render appeals meaningless

1. Timelines

- Extensions are the default, not the exception
- Third-party consultation occurs even in instances where the Act is clear about disclosure (Section 15 (2)(f))
- Departments exceed timelines with no consequence

1. Timeline recommendation

- Newfoundland and Labrador requires tight timelines for public body responses, with 20 business days for a *final* response to applicants
- NL does not allow unilateral extensions. Bodies need to ask for approval of the OIPC after the *initial* 20 days
- **Recommendation: P.E.I. amend the FOIPP Act by adopting provisions in line with Sections 16, 23 and 24 of the NL ATIPP Act, setting a deadline of 20 days for a final response from public bodies and requiring an appeal to the OIPC for extensions.**

2. User Fees

- Applicants pay $5 fee per request.
- Fees can be applied for locating, retrieving, handling, preparing, redacting records. Other fees can be applied for copying or shipping.
- First three hours are free, fees of $30/hour can be charged after that.
- Fee estimates often based solely on page counts. "Two-minute rule" per page.

2. User Fees

Cont...

- Section 76(4) of the act says fees "may" be waived if i.) an applicant cannot afford payment or ii.) records relate "to a matter of public interest including the environment or public health or safety."
- FOIPP policy manual sets out a five-question test for determining public interest. But public bodies often don't provide applicants evidence these questions have been considered.

Two recent examples where fees were applied

- Health P.E.I. -
    - KPMG final, draft reports - $1,319
- The records relate to an organization that is involved in reforms to the delivery of front-line health care. This should clearly meet the public interest test (Section 76(4))

Health P.E.I. draft report, 'deliverables' behind a paywall

CEO says releasing full KPMG documents not in public interest

STU NEATBY

Almost one year after Health P.E.I. hired consultants to look into the health authority's operations, the public still doesn't have the full details about what those consultants learned or what has changed as a result of the review.

the UPEI medical school.

The contract cost taxpayers $1.9 million for what was originally a 16-week term. In December 2024, Health P.E.I. announced a second, $3.95 million contract with KPMG for a seven-month period.

KPMG's work in its initial areas may represent a significant change in the operation and delivery of health care in the province.

A final 40-page Health P.E.I. summary of KPMG's first phase of work was released in December, but 25 "deliverables" – additional plans, reports or recommendations mentioned in the report –

for an electronic copy of this request, based on the 669 pages of this report.

The Guardian also applied through FOIPP to receive the full reports of the 25 "deliverables," including an "implementation playbook" for medical homes, and process improvement maps for workforce recruitment. Health P.E.I.'s access to information and privacy office sent a $650 invoice for an electronic copy of these records, whose page count adds up to 650.

The two invoices for these records add up to $1,319 – a dollar a



Health P.E.I. CEO Melanie Fraser responded to a freedom of information request seeking a draft final report from health consultants KPMG, arguing that The Guardian had not adequately demonstrated the importance of making the records public and therefore a fee of $669 would be charged to release it.

copy of KPMG's October interim report.

The Guardian argued the results

2. User fee recommendations

- The committee could recommend implementing a similar provision to the federal government's Bill C-58, which did away with all ATI fees beyond the initial $5 fee
- However, a middle ground is that of Newfoundland and Labrador's ATIPP regulations.
- **Recommendation: In regulation, remove fees for identifying, retrieving, reviewing, severing and redacting records and limit fees to locating records and copying/shipping. Charge applicants only after the first 10 hours for local public bodies or 15 hours for provincial public bodies**
- **Recommendation: Section 76(4): Replace "may" with "shall"**

3. Lack of clarity means redactions applied overly broadly

Discretionary redactions

- Section 15 (personal privacy) applied overly judiciously, without considering Section 15(5) (circumstances considered)
- Section 14 (business interests) also applied even when in contravention of other sections of the Act
- Section 22 (Advice from officials)

VS.

Public Interest Override

- Section 30 (1): P.E.I. FOIPP Act's 'public interest override'
    - Requiring disclosure if information is "for any other reason, clearly in the public interest

Section 30

Whether or not a request for access is made, the head of a public body shall **without delay**, disclose to the public, to an affected group of people, to any person or to an applicant

(a) information about a risk of significant harm to the environment or to the health or safety of the public, of the affected group of people, of the person or of the applicant; or

(b) information the disclosure of which is, for any other reason, clearly in the public interest.

Examples of Inappropriate Redactions: The PCH Internist letter

- A letter from PCH internists, expressing alarm at the unsustainable workload at the hospital in Summer 2022 was released but rendered unreadable due to various redactions under Section 15 (privacy) and Section 22 (Advice from officials).
- The use of both of these sections for redaction is questionable, particularly Section 22, but should also have been overridden by Section 30 as the PCH ICU closure had proven to be "clearly in the public interest."

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3. **Vacation, CME, Sick leave and Bereavement requests**: with a 1:3 complement vacations, sick leave, bereavement and CME requests may be declined if no locums are available. Each internist is entitled to 4-6 weeks vacation per year depending on their years of experience. Sick leave and bereavement leave requests will require a plan of action. CME is also vital to our licencing and regulating authorities. There is an expectation that we will complete an annual volume of CME and a 5year cycle volume of CME. We hope it would be deemed unacceptable to decline vacation, bereavement or CME requests during a period where the group is 1:3.

4. **Call days uncovered**: With pre-approved vacation, CME, and there are currently 4 days in October, 5 days in November and 1 day in December that will not be covered at PCH. There needs to be a plan to attend the admitted GIM/CC patients with safe onsite delivery of care.

5. **Post call services**: s. 22(1)(g)

6. **Remuneration for overtime**: The three remaining GIM/CC providers are all Salaried for 37.5h/week. It would be unreasonable for Health PEI/Department of Health to believe that dropping our complement from 5 to 3 will not result in overtime hours. Under the current Master agreement, overtime hours must be approved at our current hourly rate or remunerated as time in lieu. Thus moving forward, we will be recording on our time sheets our daytime hours and we ask that Health PEI /Department of Health acknowledge to us that we will receive the appropriate compensation at our current hourly rates of service for the overtime hours accrued as a direct result of the complement shortage effective September 4th 2022 until such time that we are back to a full complement of 5.

7. **Remuneration for underserviced complement**:

Per Master agreement when a complement falls below quorum there are additional remunerations to be divided amongst the remaining group. This is to continue until such time that the complement returns to normal (5 FTE providers).

- Critical Care Retention Payment: Currently 5 providers x $36,400.00 payable in equal biweekly instalments (~$1,400 q 2weeks per provider). Dr. s. 15 stipend effective September 4th 2022 until s. 15 should be divided amongst 4 GIM September 4-15 and then Dr. s. 15 nd Dr.

Examples of Inappropriate Redactions:

NHL Contract

- FTSC 2024-070 was released by Minister Zack Bell on Nov. 6, 2024
- Redactions were made of all dollar amounts in the contract under Section 14(1) (disclosure harmful to business interests of a third party)
- Trouble is, these redactions applied to a contract with government.
- Section 15(2)(f): disclosure is not an unreasonable invasion of a third party's privacy if... "the disclosure reveals financial and other details of a contract to supply goods or services to a public body."

Absurdity:

a. In the event Sponsor is selected as the host city for the 2025 NHL Awards as set forth in Section 1(f):

- Year One - 14.(1) payable as follows: (i) 14.(1) by February 1, 2024; and (ii) 14.(1) by May 1, 2024;
- Year Two – 14.(1) 14.(1) payable as follows: (i) 14.(1) by October 1, 2024; (ii) 14.(1) by February 1, 2025; and (iii) 14.(1) by May 1, 2025; and
- Year Three:
  - If PEI is also the host city of the 2026 NHL Awards, 14.(1) 14.(1) payable as follows: (i) 14.(1) by October 1, 2025; (ii) 14.(1) by February 1, 2026; and (iii) 14.(1) by May 1, 2026; or
  - If PEI is not the host city of the 2026 NHL Awards, 14.(1) 14.(1) payable as follows: (i) 14.(1) by October 1, 2025; (ii) 14.(1) by February 1, 2026; and (iii) 14.(1) by May 1, 2026.

b. In the event Sponsor exercises the Extension Option (i.e., PEI is not selected as the host city for the 2025 NHL Awards) and is selected as the host city for the 2026 NHL Awards:

- Year One - 14.(1) payable as follows: (i) 14.(1) by February 1, 2024; and (ii) 14.(1) by May 1, 2024;
- Year Two – 14.(1) payable as follows: (i) 14.(1) by October 1, 2024; (ii) 14.(1) by February 1, 2025; and (iii) 14.(1) by May 1, 2025; and
- Year Three - 14.(1) 14.(1) payable as follows: (i) 14.(1) by October 1, 2025; (ii) 14.(1) by February 1, 2026; and (iii) 14.(1) by May 1, 2026.

c. In the event Sponsor exercises the Extension Option and is not the host city for either the 2025 NHL Awards or the 2026 NHL Awards:

- Year One – 14.(1) 14.(1) payable as follows: 14.(1) by February 1, 2024 and 14.(1) by May 1, 2024;
- Year Two – 14.(1) 14.(1) payable as follows: (i) 14.(1) by October 1, 2024; (ii) 14.(1) by February 1, 2025; and (iii) 14.(1) by May 1, 2025; and

3. Access (cont'd)

- P.E.I.'s FOIPP system has also not caught up with modern methods of communication in the public sector, including platforms like Slack, Teams and instant messaging platforms
- P.E.I.'s civil service uses the Teams platform. However, the Teams retention schedule calls for Teams chat records to be deleted after 14 days as these records are deemed "transitory."
- This raises the real risk of using this platform to deliberately circumvent the Act.

3. Redaction Recommendations

Recommendation: Adopt a clearer public interest provision in legislation like Newfoundland and Labrador's ATIPP Act (Section 9) that clearly sets out that "discretionary exceptions" to disclosure, are outweighed when it is clearly demonstrated disclosure is in the public interest.

Recommendation: The standing committee on health and social development should review the retention practices employed within the civil service for communications outside of email, namely Teams chats or video calls, to ensure that these practices are in compliance with the FOIPP Act and regulations

4. OIPC timelines

- In my experience, appeals before OIPC are not resolved for multiple years. This has been the case since at least 2020.
- Example: The Brendel Farms report is still stuck in an OIPC appeal, nearly five years after it was requested
- Example: An appeal involving the IRAC investigation of Buddhist landholdings has been before the OIPC for more than four years.
- Example: The 2018 appeal into deaths at the Provincial Correctional Facility

The OIPC appears to be offside of the FOIPP Act

Section 64 (6)

"An inquiry under this section shall be completed within 90 days after receiving the request for the review unless the Commissioner:

(a) notifies the person who asked for the review, the head of the public body concerned and any other person given a copy of the request for the review that the Commissioner is extending that period; and

(b) provides an anticipated date for the completion of the review."

The OIPC's response to me

May 20, 2025

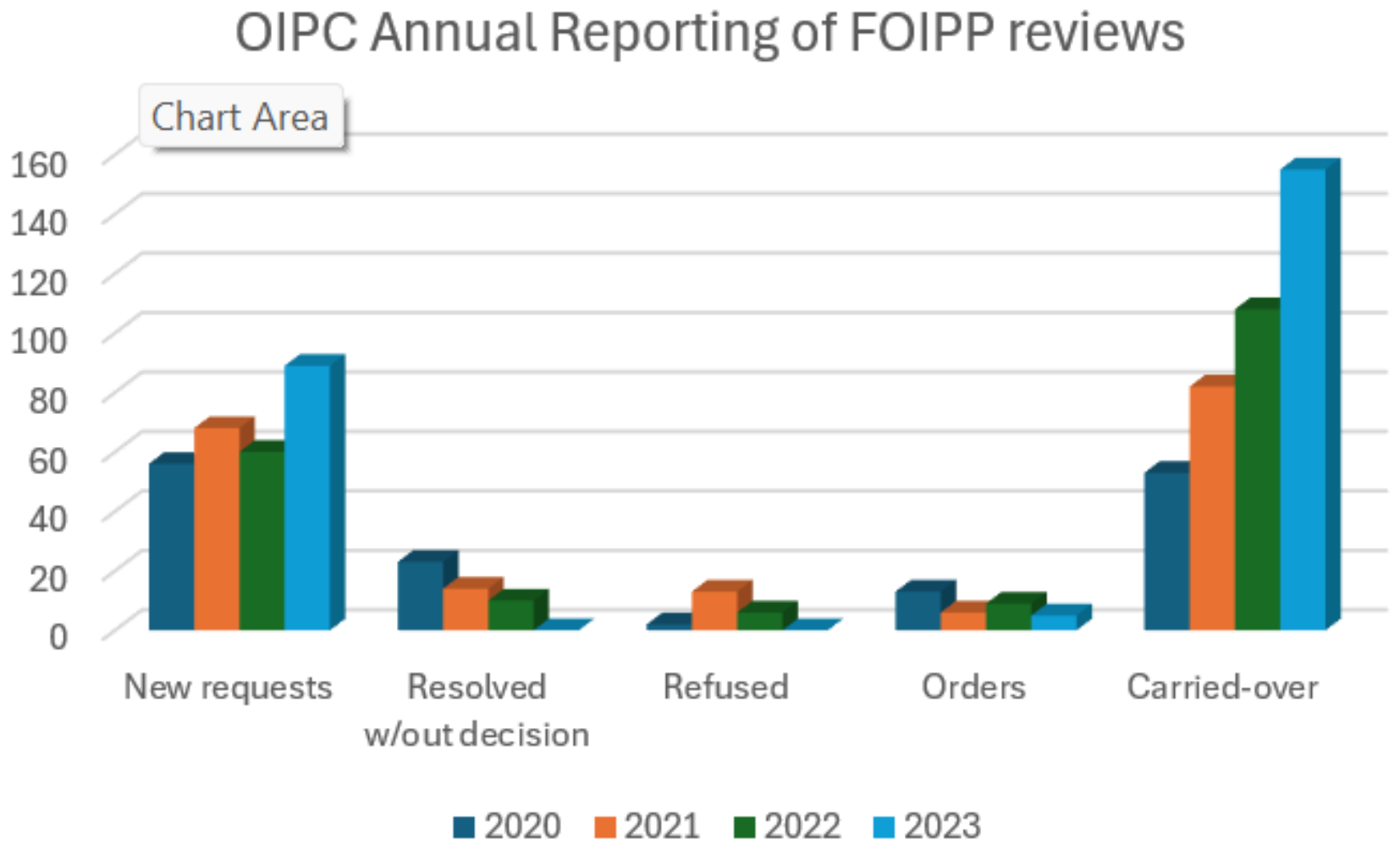
“We regret that we cannot give you a more exact date upon which to expect an order. It is very difficult to estimate when we will be able to complete your review. Reviews do not take an equal amount of time for each file. The amount of time may vary with the number of responsive pages, the number of parties, the number of provisions at issue, and if there are complex or novel legal arguments.

In addition, our case load continues to increase beyond our current capacity to address efficiently. We have increased our staff complement and are in the process of filling our vacancy, which we are hopeful will happen in the near future. Once our staff complement has been increased and our new staff has received adequate training, we are optimistic that this will greatly assist in addressing the workload.

We understand that, with the passage of time, you may no longer wish to pursue the above-referenced review. Please advise this office at your earliest opportunity if this is the case.”

Frankly, this is unacceptable

- The OIPC office is supposed to be an avenue for appeal and is tasked with ensuring other departments are adhering to the Act. If the OIPC office is unable to follow its own timelines – or even offer estimated timelines for completion – then it renders the appeal process largely useless
- There has clearly been an increase in workload
    - Dec. 2015 – 31 open files
    - Dec. 2024 – 186 open files
- Since 2020/21, the OIPC yearly budget jumped from $317,300 to $722,100 in 2025/26.



Source: OIPC Annual reports 2020-2023

4. OIPC Recommendation

Recommendation: The OIPC should follow the FOIPP Act, including Section 64(6).

If the OIPC cannot presently follow this section of the Act, then the office should be making clear recommendations to this committee about what the office needs to clear its growing backlog of reviews.

The committee should examine why the number of orders issued by the OIPC office yearly appears to be diminishing

Final Thoughts

- There are FOIPP advocates in Canada who the committee should hear from
- I would recommend the committee reach out to:
    - Toby Mendel, Centre for Law and Democracy
    - Tom Cardoso, Robyn Doolittle, Secret Canada/Globe and Mail
- Also see: 'Canada's island of transparency,' Globe and Mail, July 3, 2023

https://www.theglobeandmail.com/canada/article-newfoundland-foi-system/

Final Thoughts

- P.E.I. is not generally considered the worst jurisdiction when it comes to Access to Information. But that's not saying much.

- Trust in government is at low levels everywhere in Canada. P.E.I. could get ahead of this dark trend by embracing true transparency and adopting a leading Access to Information law.

- Newfoundland and Labrador has already led the way.

Recommendations

1. Amend the FOIPP Act by adopting provisions in line with Sections 16, 23 and 24 of the NL ATIPP Act, setting a deadline of 20 days for a final response from public bodies and requiring an appeal to the OIPC for extensions.

2. Establish regulations that remove fees for identifying, retrieving, reviewing, severing and redacting records and limit fees to locating records and copying/shipping. Charge applicants only after the first 10 hours for local public bodies and 15 hours for provincial public bodies

3. Replace the word "may" in Section 76(4) with "shall"

4. Adopt a provision like Newfoundland and Labrador's legislation (Section 9) that clearly sets out that "discretionary exceptions" to disclosure, (including policy advice or recommendations, legal advice, disclosure harmful to financial interests of a public body, etc.) are outweighed when it is clearly demonstrated disclosure is in the public interest.

5. Review the retention practices employed within the civil service of retention of Teams chats or video calls to ensure that these practices are in compliance with the FOIPP Act.

6. The OIPC should follow the FOIPP Act, including Section 64(6). If the OIPC cannot presently follow this section of the Act, then the office should be making clear recommendations to this committee about what the office needs to clear its growing backlog of reviews. The committee should examine the output and number of orders issued by the OIPC office yearly and establish why the number of these orders appears to be diminishing despite a larger budget.