



ATIPPA STATUTORY REVIEW COMMITTEE 2020

Transcript

Volume 5

Committee Chair: Honourable David B. Orsborn

Tuesday

26 January 2021

CHAIR ORSBORN: Good morning.

Welcome to this public consultation session of the 2020 review of the Access to Information and Protection of Privacy Act.

Presenting this morning is Mr. Bruce Chaulk in his capacities as Chief Electoral Officer and Commissioner for Legislative Standards, both of which are statutory offices. Mr. Chaulk is accompanied by his counsel, Mr. Andrew Fitzgerald.

Welcome to you both.

They have previously submitted written submissions on behalf of both offices. Those submissions may be found on the committee website. I'll now invite Mr. Chaulk and/or his counsel to elaborate on the submissions as you see fit.

Thank you, Sir.

MR. FITZGERALD: Thank you, Commissioner.

I'll begin, Mr. Chaulk is here as well. As you correctly pointed out, he wears two hats in this role as the Chief Electoral Officer and the Commissioner for Legislative Standards.

I guess I would start off by saying that I think guidance can be found in the Green report following the constituency allowance spending scandal with respect to the origins of the statutory offices. Basically, there are a lot of good comments in his report regarding the independence of these offices and how they need to be independent of government, so essentially they can carry out their role unimpeded.

While there are privileges in the ATIPPA, section 41(c), we've had instances where individuals are trying to obtain the investigative file of the Commissioner for Legislative Standards. That matter is before the court, but, fundamentally, if these –

CHAIR ORSBORN: That's the interplay with section 33, is it?

MR. FITZGERALD: It is, exactly. I've dealt with that in our submission.

Fundamentally, if these offices are going to be effective and do their job, there cannot be any interference, whether it be implicit or explicit or perceived, from individuals attempting to obtain information from those offices.

I have some submissions here and I'm not going to comment or repeat what Mr. Chaulk has in his submissions to you, but I do want to make some points.

Mr. Chaulk doesn't come across the ATIPPA a lot, but when he does it can be time consuming and difficult. The Elections Act, really, is about having fair elections in a democratic system. We've seen now how important that is, in particular, after what's gone on in the United States, how fairness is important.

Generally speaking, the documentation that he receives, whether it be voters' lists, nomination papers, they contain personal information. If an access request comes in, Mr. Chaulk would have to process it and 90 per cent of the information that the individual is going to receive is going to redacted because it's essentially a personal information exercise in determining who has the right to vote, their age, their name and whatnot.

You may think that, well, who would want that? This kind of plays into the whole secret ballot concept. You're not entitled to know how someone voted. You shouldn't be also entitled to snoop and see who nominated who, who signed the nomination paper and try to elicit that information from the elections office. There's no need of it.

I think the elections office, by its very nature and independence, promotes democracy in other institutions. What we would suggest is that the act needs something in there, whether it's the ATIPPA or the Elections Act, just confirming that election documents and records, whatever way it wants to be defined, are not subject to the ATIPPA.

CHAIR ORSBORN: You indicated that there was no need of it. My understanding with the access to information legislation is that an applicant really doesn't have to demonstrate need or why they want it.

In terms of the election papers, I appreciate that it's an administrative burden with the redaction and whatnot, but can you put your position in terms of the harm that may follow if the documents are released?

MR. FITZGERALD: I don't believe there's – the Commissioner is actually prepared to answer that.

MR. CHAULK: One of the things that we have seen with respect to nomination papers was that people wanted to know who supported the nomination of the other person. Now, we verify that particular information to ensure that the people who supported the nomination of a particular candidate are eligible to do that particular role. But we always worry that someone in opposition, and opposition to that particular candidate, may want that information to retaliate against people who supported that particular person.

MR. FITZGERALD: I guess another point, too, Justice, you talk about what's the harm. I think you need to keep proportionality in mind. There is a check and balance in terms of promoting democracy because if there is an issue in an election, a candidate, a voter or a political party has the right to make a controverted election application, or to make an application for a recount. So there is a check and balance there to promote democracy in the context of the Elections Act, which you don't often see in other statutes.

Just to be clear – and this is in keeping with Justice Green – Mr. Chaulk is not saying that the administrative functions of his office are not subject to ATIPPA in terms of what he's paying for paper and paper clips and whatnot. I mean, the administrative things are fair play and that holds his office into account. But in terms of what information can be elicited from the ballot boxes and the election documents, there isn't a great utility of this going out to the public, en masse, given the amount of personal information that's there.

CHAIR ORSBORN: Going back to the nomination papers in terms of who signed for who: Is that considered to be personal information?

MR. CHAULK: Yes, it is. So we would redact –

CHAIR ORSBORN: So you would redact that in any event?

MR. CHAULK: We would redact, basically, almost the entire paper, other than the candidate's signature and possibly a witness, but we would have to pretty much make that document meaningless, at the end of the day.

CHAIR ORSBORN: So going back to your retaliation issue: What information is there that you could use to retaliate against someone?

MR. CHAULK: Yeah, at this point, because we redact so much of it, it would be impossible for them to figure out who supported that particular candidate.

CHAIR ORSBORN: Are you able to give me some idea of the experience that you've had in either or both offices in terms of the types of access requests that you've had?

MR. CHAULK: Yeah. We've had that particular request to access the nomination papers of a rival candidate. When we explained to them, to the particular candidate, that that information – what we would be left with is basically nothing, he decided not to go forward with that particular request.

We've had requests with respect to our legal fees; what we're paying our legal fees for and who we paid with –

CHAIR ORSBORN: Leaving aside any privilege issue, which is a different issue, is that a fair question?

MR. CHAULK: Yes, and we have dealt with that. I think we refused one request for the legal fees on the basis that it would be able to determine how we were – are the advice that we're being given and timing of it.

We've had requests for decisions about where we put our polling stations throughout an election: Why did I have to vote here when I drove past the location before? That particular one required us to go through, show the manuals and show all of the decisions that were made in

trying to figure out where the polling station was located. That's just a couple.

CHAIR ORSBORN: Does your office have the resources to handle requests like that?

MR. CHAULK: The person who handles our ATIPP requests handles it for both the Commissioner and for the Chief Electoral Officer, but they also have other duties and so we don't have a dedicated resource for that.

CHAIR ORSBORN: Do you have any idea what the situation is with your colleagues across the country in terms of access to election documents?

MR. CHAULK: Most of them are outside of the act. The Commissioners are almost all outside the act.

MR. FITZGERALD: If I may, Justice, I'm going to move on from the Chief Electoral Officer and more to the Commissioner for Legislative Standards.

I would point out – and I'm sure you're aware – there are a number of privileges and exceptions already in the *House of Assembly Act* in relation to the Commissioner for Legislative Standards. Section 50 of that act indicates that:

“Information disclosed by a member or the member's family to the commissioner under this Part or a regulation made under this Part or in the course of the administration of this Part shall not be disclosed under the *Access to Information and Protection of Privacy Act, 2015* or otherwise than in accordance with this Part.”

That is the provision of the act that has to do with the disclosure of interests with respect to the filling out, the completion of a public disclosure statement. Mr. Chaulk is responsible for meeting with our elected officials. They have to provide him with a list of their assets and liabilities. He will provide advice to the Member about how to – recommend how they should sort out their affairs to be in compliance with the act. That back and forth between Mr. Chaulk and the Member is not subject to the ATIPPA in terms of the Member's holdings.

The other sections of the act, and I'm not going to read these out in whole, but it is sections

36(5), 38(4) and 40(3). Those sections contain a statutory privilege of the advice that Mr. Chaulk gives to the Member with respect to compliance with the act. While we might say: Well, it's already there in a statute, why do we need more certainty? We have certainty in section 50 and there is a privilege here section 36, but the issue becomes section 7 of the ATIPPA, which says the ATIPPA reigns supreme unless it's included in a Schedule. There are instances when people say: If it was meant to be excluded, that privilege under section 36 or 40, it would be listed in the Schedule and it's not. Then you get into that interplay between statutes and it's unnecessary, in my opinion.

Secondly, if there's already that amount of information excluded under section 50 of the *House of Assembly Act*, if the privileges already exist in sections 36 and 40 of the act, why – there's not much left to be excluded, is what I'm saying. I think in terms of the Commissioner for Legislative Standards, a simple amendment to say that any and all information in his possession is not to be disclosed but for the administrative functions of his office, in terms of whether it's legal fees, paper clips, et cetera, that goes right to the independence of that office and the ability for Mr. Chaulk, or whatever Commissioner is there, to do their job. He or she should not be looking over their shoulder worrying about what they have in their files.

CHAIR ORSBORN: I'm going to ask you to go over that again, because I don't think those sections are highlighted in your submission, were they.

MR. FITZGERALD: No, they weren't.

CHAIR ORSBORN: Okay.

MR. FITZGERALD: I have them here, actually, Justice.

Section 36(5) of the *House of Assembly Act*, states: “A disclosure statement made under this section is privileged except to the extent necessary to insure compliance with this Part.”

CHAIR ORSBORN: Okay, and that's a financial disclosure statement?

MR. FITZGERALD: Yes.

CHAIR ORSBORN: Okay.

MR. FITZGERALD: Section 38(4): “Advice or a certificate given by the commissioner to a member under this section is privileged, except to the extent necessary to insure compliance with this Part, to the member, and may be made public only by the member or with the member’s written consent.”

You may have a situation where a politician may own a business and he or she goes to the Commissioner and says: I want your opinion on this. Now, it is privileged, but if the Commissioner gives a favourable opinion, that Member may want to table that in the House of Assembly and say: I’m allowed to speak on this issue, here’s my certificate, so the privilege is waived. That’s the context that would operate in.

CHAIR ORSBORN: Okay.

MR. FITZGERALD: Finally, section 40(3): “The opinion and recommendations of the commissioner are privileged, but may be released by the member or with the consent of the member” It’s similar to section 38(4). It has to do with who’s asking the question, I believe, in terms of the advice that’s being provided.

CHAIR ORSBORN: They’re focused on the financial disclosure issues.

MR. FITZGERALD: Yes, and the conflict of interest issues.

CHAIR ORSBORN: Yeah.

MR. FITZGERALD: Interestingly enough, too, it’s not limited to the Member; it’s also the Member’s family. There has to be complete disclosure by the spouse, as well, or the partner of the Member with respect to their financial holdings.

In essence, when you look at the ATIPPA, it’s about promoting transparency and accountability in our democratic institutions. Mr. Chaulk’s role in terms of this public disclosure statement and the information that comes in is essentially promoting that. The privilege exists so a politician or an elected Member can be fully frank with the Commissioner and say: Here is

everything I have. Then the Commissioner will prepare a public disclosure statement so individuals know and have the assurance that the elected Member is not in a conflict or running afoul of the Code of Conduct.

It kind of goes hand in hand with what the ATIPPA is trying to promote, but at the same time, there’s nothing there that says maybe this act should not be subject to access to information; maybe it should be included in the Schedule.

Any questions?

CHAIR ORSBORN: Not on that. Were you finished?

MR. FITZGERALD: In terms of the Commissioner for Legislative Standards, the only other piece we touched upon is section 33 versus section 41. Section 41(c) is the investigatory privilege of all statutory offices, including the Privacy Commissioner, I might add. These offices were created – they’re all independent offices of the House of Assembly. One of the issues that arises with respect to section 41(c) – and it has arisen; we don’t have a judgment on it yet – is parliamentary privilege. The idea that these statutory offices answer to the House of Assembly.

I will direct you to *Duffy v. the Attorney General of Canada*, the Ontario Court of Appeal. In that case, there’s a pretty thorough review of parliamentary privilege. I know you’re familiar with it but that is a recent authority. You go in and someone makes a request for the working documents of a statutory office; we’re going to say it is investigatory privilege under 41(c). But there’s also an issue of whether the court can order it because of parliamentary privilege. That is one of the issues that are currently outstanding before the court.

What I’m getting at is that by having these statutory offices, the investigative nature – I know the privilege is there in section 41(c), but people are starting to creep in on that and trying to get documents from the Commissioner or the Chief Electoral Officer, and there is a previous case with the Citizens’ Representative. But it’s unnecessary in terms of if these offices are going

to function. For anyone to come close to that file, they don't need it.

Secondly, the remedy for any of that should be done by the Legislature, and I guess they will, in terms of what your recommendations will be.

CHAIR ORSBORN: Are you suggesting something other than an amendment to 41(c) to –?

MR. FITZGERALD: Section 41(c), what I've suggested in my –

CHAIR ORSBORN: Well, to put it in section 33 (inaudible) –

MR. FITZGERALD: Yeah, notwithstanding section 33.

CHAIR ORSBORN: Yeah, because there's a whole issue around section 33 as well.

MR. FITZGERALD: That's the problem, right? I mean, that's the biggest problem we have in terms of Members are – the Code of Conduct is there and Mr. Chaulk is tasked with doing Code of Conduct investigations and whether Members or employees should they be entitled to some of this information in the investigative file. That's all before the court and I don't want to prejudge what Justice Knickle is going to do, but in terms of on a go-forward basis, I think clarity would be appreciated for all of the statutory offices knowing that their files are not subject to this access.

It does go to independence, Justice. All of these statutory offices, while they are independent, it's a difficult job. Policing the politicians, it's not exactly easy sometimes and you are in the fray. Anyone that has that job – and on the Mainland it would be an integrity commissioner or an ethics commissioner, that's what Mr. Chaulk is doing. He should be able to freely investigate matters and provide opinions to the House. Ultimately, the House can agree or disagree with Mr. Chaulk, but the idea that someone should be able to go in and look at his file after the fact, that's not in keeping with an independent statutory office. It's completely contrary, actually.

CHAIR ORSBORN: You say after the fact.

MR. FITZGERALD: Yeah.

CHAIR ORSBORN: You're talking about once an investigation is completed and the report is made to the House.

MR. FITZGERALD: That's right.

CHAIR ORSBORN: And you're talking about the investigative notes, file or whatever.

MR. FITZGERALD: Yeah.

CHAIR ORSBORN: Okay.

MR. FITZGERALD: By analogy, it's similar to a judge's notes.

CHAIR ORSBORN: One of the suggestions made – and there's been a variety of suggestions made on section 33, this is in the context of a workplace investigation – is that the access should only be to the report and not to the investigator's notes or files. Something like that would address your concern, I take it?

MR. FITZGERALD: Interesting, maybe. The report of the actual statutory officer, yes, in terms of Mr. Chaulk's report is already out there. But a report that he or she receives from an investigator, I would say no, that's a part of the investigative file going back and forth and it's up to Mr. Chaulk to determine whether or not, or any other statutory offices, whether they're going to accept what's in those reports. That's part of the investigative function. No, I wouldn't say – no, you're not entitled to it.

CHAIR ORSBORN: Do I understand that your investigations under this legislation, you deal with investigations other than harassment? The harassment goes to the Citizens' Representative?

MR. CHAULK: Yes, currently that's the function. My role now on the Commissioner side is the *House of Assembly Act*, the *House of Assembly Accountability, Integrity and Administration Act*. I do investigations of the Members with respect to the Code of Conduct, or with respect to the conflict of interest with the Legislature.

If I might add on one point when you talk about the investigatory file. I have had situations

before where a file was done by a previous Commissioner and I was asked to look at it again. It all brings up the issue of privilege, because I can't overturn the decision of a previous Commissioner, unless there is more sufficient evidence provided that the first Commissioner didn't have when he was making the original decision. Otherwise, you would be essentially shopping for an opinion.

Before I could even look at a file completed in my own office by someone else, I would have to make sure that there was additional information that wasn't available to be reviewed before I would even look at reviewing that file again. Sometimes those files were privileged documents to start with.

CHAIR ORSBORN: Are you saying that you, yourself, would be precluded from looking at the file?

MR. CHAULK: I would be able to review them, but I wouldn't be able to issue a new opinion on it, changing the other opinion, unless I had something that the other Commissioner – sufficient evidence that wasn't provided previously.

CHAIR ORSBORN: That's a little different, I take it, than the access issue, is it not?

MR. CHAULK: It sort of runs along the same vein as that. Once my report is done, it's basically concluded and someone else shouldn't be able to go in and look at my file and say: Well, I think he made a mistake because you didn't consider this or whatever.

CHAIR ORSBORN: In terms of your recommendation on the Legislative Standards, are you suggesting that the Office of the Commissioner should come out of the act, other than the administrative matters, or that there be an appropriate amendment to 33 or 41(c)?

MR. FITZGERALD: I guess out of the act altogether would be the most appropriate in our opinion; however, subject to a couple of caveats. Number one, the financial aspects of the office should be out there. One should know what's going on in terms of that, that promotes accountability and democracy, and if there is a workplace investigation within the office itself.

You could have an employee of the Chief Electoral Office and the Commissioner for Legislative Standards making a workplace complaint. Now, whether that would go to the Citizens' Rep right now in terms of the harassment piece, I guess would depend on the nature of the complaint. I think it's tricky because there still needs to be an avenue for any individual in an office to make a complaint, while at the same time you need to protect the investigative file when the Commissioner is doing his oversight role of the elected Members.

I think when he's doing the second role and his primary role there should be no interference and no access to any of his file. There needs to be something clearly – similar to section 50 of the *House of Assembly Act* – that says that information is a no-go. That would also satisfy, then, the section 7 provision of the ATIPPA talking about it reigns supreme, if the Legislature had something in there specifically that would address it.

CHAIR ORSBORN: Okay, I'll just go back and ask just to summarize again your position on the election documentation.

MR. FITZGERALD: Well, the election documentation, I guess, it goes to proportionality. If there's an issue with an election, an interested party is going to be entitled – they have a remedy, they can go to court and seek a controverted election or a recount.

The administrative burden on the office having to redact papers – and it is a redaction exercise, because 90 per cent of the information is going to be personal in any event. It serves you little utility in promoting democracy by having those election documents subject to the ATIPPA. I think that they should be excluded in some way, shape or form. It's an unnecessary disproportional administrative burden.

I know there are other public bodies that say that to you, but I think the Elections Office is a little bit distinct, given that their role is to promote a fair election for everybody, and there are remedies in the statute if there is an issue, in terms of elections and by-elections.

I think that is where I'm to on the Elections Act, unless you have a question.

CHAIR ORSBORN: No. One would expect that a contrary opinion would say that you basically have no business asking me what I want the information for.

MR. FITZGERALD: No, and that exists all over the ATIPPA. I'm not asking you what you want the information for; I'm saying no matter what you ask for, in this particular context, so much of it is going to be redacted in any event.

CHAIR ORSBORN: Right. You're saying you don't need this because it's going to be no good to you.

MR. FITZGERALD: Yes.

CHAIR ORSBORN: That's your position, and because it's no good to you, we shouldn't have to worry about it.

MR. FITZGERALD: Yes.

CHAIR ORSBORN: Okay.

MR. FITZGERALD: It's all in context with the Elections Act, but the other thing is that we do have the assurance, in terms of promoting accountability, that the election documents are all preserved after an election for a period of time by statute. If there is an issue after an election, the voter, the party, the candidate, the interested citizen knows that those documents are there if they need to go and make an application with respect to an election. That's there.

I would also say that in terms of the Commissioner for Legislative Standards – this will give you an idea of how sensitive this information is for elected Members – once a Member is no longer a Member, Mr. Chaulk has, I believe, one year and he has to destroy all the documents he receives in relation to that.

MR. CHAULK: One year after a Member is either not re-elected or leaves office, their entire file is destroyed, complete.

MR. FITZGERALD: There's no risk of it ever coming out, which does highlight the sensitive

nature of it and how, really, there should be clarity with respect to what can and cannot be subject to access.

MR. CHAULK: If I might add one thing with respect to the Elections Act, most of the materials that we have are secured in the ballot box for a period of time after the election. The only way to get access to them is through a court order. I can't even open the box without a court order to open it.

We do protect the documents for the time required. There is no opening of the boxes before that period of time is expired for them to be able to launch a legal remedy into that particular district.

CHAIR ORSBORN: You can't get at what's in the ballot boxes through ATIPPA I take it, can you?

MR. CHAULK: I think if you tried section 7.

MR. FITZGERALD: That's the issue.

MR. CHAULK: I would go to court for it, say that –

CHAIR ORSBORN: It's a question of whether or not ATIPPA can be used to order the unsealing of ballot boxes.

MR. CHAULK: Yes.

CHAIR ORSBORN: Okay.

MR. FITZGERALD: Because at section 7, it says the ATIPPA reigns supreme; unless you're listed in the Schedule, you're out of luck. Clarity on that would be helpful.

CHAIR ORSBORN: Have you had any requests for any part of the Permanent List of Electors?

MR. CHAULK: We provide the Permanent List of Electors to the parties under a statutory requirement. They're provided a copy of the list every year, and then every candidate, after they file their nomination papers, gets the list for that particular district. They are also instructed along the way as to what they are allowed to do with the list and how they have to destroy it after a

certain period of time, or return it after the election.

In the case of a paper list, they can either destroy it or they can return it to us and we will destroy. Our list probably has very little information in it for – what’s in our registry is different than what’s on our list because we have additional information in our registry. It may have telephone numbers and information, birth dates, but on the voters list that we provide we only give them the name and the address of the particular person in order to be able to identify them at the polls.

CHAIR ORSBORN: All of which, I would think, would be personal information (inaudible).

MR. CHAULK: Yes, for the most part, but I think I’ve had a former Privacy Commissioner say it’s not much different than what’s in the telephone book. Really, it’s less than what is in the telephone book, in some cases, because we don’t have the telephone number there. We do have all of the names of the people in the household, which is not in the telephone book.

MR. FITZGERALD: By way of example, too, Justice – this might be a good example, as well, in terms of election documents – it’s anticipated Mr. Chaulk is going to get a significant amount of applications for special ballots in this election because of the COVID outbreak. That’s more paperwork. People have to send in their IDs, fill out their forms and they get their ballot. It’s all operated by Elections NL, obviously.

The issue is that, once again, if someone were to request those documents, they’d be getting a lot of redaction, just personal information. It’s not proportional and it’s administratively cumbersome in the context of an election.

CHAIR ORSBORN: All right, anything else?

MR. FITZGERALD: I’m good here.

Thank you.

CHAIR ORSBORN: Thank you both very much. Much food for thought.

MR. CHAULK: Thank you.

MR. FITZGERALD: Always is.

CHAIR ORSBORN: Thank you.

This session is adjourned until 9:30 tomorrow morning, when we will have the round-table discussion on section 33.

Thank you both.