Submission to the Standing Committee on Law Amendments

Nova Scotia Legislative Assembly

Regarding Bill 89, An Act Respecting the Collection, Use, Disclosure and Retention of Personal Health Information

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Dear Honourable members of the Law Amendments Committee:

Preamble

I want to begin by saying that my concerns do not relate to the core purposes of the act. Clearly there is a need to manage and secure sensitive health information to ensure privacy and effective management of a large and complex system. Instead, my concerns relate to what you might call the collateral damage that could be inflicted by this proposed legislation and the very real damage it would inflict on the rights of journalists to freely conduct their work in the public interest and on the public's right to access records held by public bodies. I feel that certain provisions in this bill are incompatible with our proud tradition of democracy and open government in Nova Scotia. The bill would impose obligations and penalties on individuals who are not part of the health care system in clear violation of the Charter of Rights and Freedoms, and engage in an unnecessary evisceration of the freedom-of-information legislation of which we are all justly proud. All of this damage could be avoided with a few simple amendments to this bill.

About myself

I am a longtime journalist and user of access legislation. I run an annual audit of performance of institutions under access laws, for the Canadian Newspaper Association, and am author of a chapter in an upcoming peer-reviewed book on access in Canada. I am also co-author of three journalism textbooks, including the leading text on investigative journalism in Canada. Therefore, I feel I have some authority to speak on these matters and on this bill's potential impact on the public's interest in government accountability and free speech.

My detailed concerns

This is a long and complex bill and I have not had a long time to study it. However, I am concerned about three aspects of the proposed legislation:

1. The first is the penalty provision in clause 106(b) which states that, "A person is guilty of an offence if the person....willfully gains or attempts to gain access to health information in contravention of this act or the regulations." Individuals could be fined up to $10,000 or sentenced to up to six months in jail, if found guilty. If a corporation is involved, not only would it be liable to a fine of up to $50,000, but its employees would be liable to prosecution if they authorized the offence or failed to exercise authority to prevent it being committed.

My concern is with both the clause itself, and with its being read in concert with clause 43(e) of the bill, which makes it clear that disclosure of personal health information to the media is only permitted with the express consent of the individual involved.

Either alone or in concert with 43(c) the penalty clause 106(b) could result in prosecution of journalists for carrying out their normal duties in seeking information on behalf of the public, something that I believe would be contrary to the charter's guarantee of free expression.

Let me give you an example. Imagine if a high-profile public figure such as the premier were hospitalized. There would be a great deal of public interest in knowing the condition of the head of government in Nova Scotia. But the wording of this act suggests that a journalist could be fined or jailed simply for trying to find out from a nurse the condition of the individual. The act is clear that personal health information includes both recorded and unrecorded information, and a nurse would be a representative of a custodian of health information, so there is no doubt that the disclosure would be contrary to the provisions of this bill.

Similarly, if a journalist sought information from a whisteblower about patients who died as a result of sloppy surgery, a matter of clear and compelling public interest, the journalist could be prosecuted, even though the reporting might save lives.

As you know the Canadian Charter of Rights and Freedoms guarantees, "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication." As well, in the recent Supreme Court case *Globe and Mail v. Canada (Attorney General) 2010 SCC 41*, the court ruled that journalists shouldn't be held responsible for the legal breaches of others who provide them with information. "The fact of the matter is that, in order to bring to light stories of broader public importance, sources willing to act as whistleblowers and bring these stories forward may often be required to breach legal obligations in the process," the court wrote.

The charter and court provide a significant level of protection for journalists carrying out their duties on behalf of the public, yet Bill 89 appears to be a statutory attempt to extend legal obligations of secrecy to anyone, including journalists, who willfully attempt to obtain personal health information in contravention of the act. Bill 89 uses the strong hand of the state to attempt to limit the freedom of journalists and others to seek information of potential public interest.

2. My second concern relates to the broad definition of personal health information and the effect of the bill to exclude records containing this broadly defined class of information from the application of the Freedom of Information and Protection of Privacy Act.

FOIPOP already contains provisions to protect personal privacy, and I am not aware that it has not been effective in ensuring that sensitive personal information, which may be contained in many records, is not disclosed to applicants. Most complaints that I hear relate to strict interpretation of the act and aggressive application of exemptions to access, not to over generous release of information. Yet despite little evidence of a problem with overly lax access to health information, Bill 89 would remove a vast swath of records from the application of the act and impose a harsh, new regime to limit access.

As you know, section 2 of the Freedom of Information and Protection of Privacy Act states that the purpose of FOIPOP is "ensure that public bodies are fully accountable to the public." Therefore, removing records from its application is no small matter. Once records are not subject to FOIPOP, the normal procedures for balancing the right of access with the right to privacy are no longer available. With Bill 89, as soon as records are deemed to contain a class of information called "personal health information," the public loses the right to even make its case for access under the act and its normal right to a review, other than perhaps of the question as to whether the records contain personal health information. Accountability is diminished.

A big problem is the definition of "personal health information" in Bill 89. It is a difficult definition to parse because if relies on two other definitions, for "health care" and "identifying information" to fully understand its implications. When one reads clauses 3(l) and 3(r) together one realizes that personal health information doesn't just mean information that specifically identifies an individual, but includes any information that, if combined with other information in the public domain or otherwise, could allow someone to identify an individual. The definition of "identifying information" says it includes any information "where it is reasonably foreseeable in the circumstances" it "could be utilized, either alone or with other information, to identify an individual."

Any records created primarily for the purpose of health care that contained any information that met this definition would be excluded from the application of FOIPOP unless that information was first removed. This is a dramatic expansion of the FOIPOP requirement that information that actually identifies individuals be withheld.

This has serious implications for access. It will no longer be sufficient to "anonymize" information by removing personal information. Now, officials of health information custodians that are also public bodies under FOIPOP will be put in the position of having to analyze and predict possible connections with outside information, to determine if it is "reasonably foreseeable" that by making those connections, individuals could be identified. Privacy consultants will probably have to be hired and their word will effectively become the law.

The result will almost certainly be strictly conservative access decisions as custodians seek to minimize the risk of releasing information that MIGHT lead to identification of individuals. This will result in a significant diminishment of the right of access contemplated by FOIPOP and a diminishment of its accountability role.

You should remember that many records that contain personal health information also constitute records of the performance of the health care system and its principals. This is contemplated by Bill 89 itself in clauses such as 38(1)(g) which permits the disclosure of personal health information to the Minister of Health Protection and Promotion for the management of the health care system. But outside scrutiny of such matters is important as well.

Sometimes it is necessary to examine anonymized raw data in order to see important patterns in system performance. Removing these records from the application of the act diminishes the ability of the public and journalists to hold officials accountable for the performance of the system.

To give an example, if a journalist requested access to a database of ambulance calls in order to test the speed and effectiveness of ambulance service, there might be little left of value in the data once the de-identification standard of this bill were satisfied. Presumably, anything that might be able to be linked to outside information, such as the date and time of a call and even an area of a municipality, would have to be removed because of the possibility someone could match up information already in the public domain with one of the records in the database. For example, if someone dies and there is an obituary in the newspaper, there would be a small but forseeable chance that an enterprising requester might be able to guess at which call was involved if the date and time is included. But, as must be obvious, the more information about the circumstances of the calls that was removed, the less useful the data would be for the public-interest purpose of the reporting. The diminishment of the access right would have a far greater impact than the minimal additional information that would become public beyond what was already contained in the obituary. Yet under Bill 89, this small but foreseeable chance would be enough to deny access to the entire database.

I would contend that the privacy protections in FOIPOP provide adequate protections because they already require that any personal information about "an identifiable individual" be withheld. Adding a new, and quite vague provision, that allows officials to deny access merely because something is "reasonably foreseeable" creates a Mack Truck-sized opportunity to deny access to many records in the public interest. As well, the removal of FOIPOP as the instrument for access eliminates all of public interest safeguards in FOIPOP, such as the public interest override in section 31. All of this to solve a problem that it isn't clear actually exists.

Interestingly, the sweeping removal of records from FOIPOP would not apply if the records containing personal health information also contained information subject to the exemptions in sections 12, 13, 14, 15(1)(b) or 21 of FOIPOP. It seems the interests protected by those exemptions, such as shielding information provided by third parties, are significant enough to override the protections for personal health information that are presumably the reason for setting aside FOIPOP when personal health information is involved. Since FOIPOP would apply in those instances where the exemptions could be applied, the personal information protections in FOIPOP are presumably sufficient to protect necessary privacy interests in those instances. Yet if the information is not subject to these exemptions, the public's interest in information, and provisions that protect the public interest in information, must be swept aside. This suggests that the greatest interest contemplated is making sure as much information as possible is kept from the public.

I should also note that the definition of "health care" in the bill leaves it to the regulations to define additional instances of what health care is. Because "health care" is used in the definition of personal health information, this could lead to a broadening over time in the scope of the term "personal health information," by cabinet order, and the removal of more and more information from the application of FOIPOP.

3. Finally, I am concerned about clause 46, which also removes information from the scope of FOIPOP, in this case leaving it up to the minister whether information could be released from either the health care number data base or the Common Client Registry. Given the sensitivity of much of the information in these databases, it is unclear how much would be releasable under FOIPOP's existing provisions, but it might be possible to release anonymized data from one or either of these databases, perhaps using randomly generated unique identifiers to replace health numbers. Similar severing was done when the Toronto Police Service released sensitive data to the Toronto Star under Ontario's access legislation. The public interest in such a release is that it would allow journalists to look for abuses in payments or usage patterns. But with clause 89 in place, it would be impossible to even have that discussion. It is my view that the existing regime for access should be retained rather than giving the minister carte blanche powers to make the decision regardless of the provisions of FOIPOP.

Recommendations:

I would suggest the following amendments to Bill 89:

Clause 3(g)(ii) should be deleted.

Clause 3 (l) should be amended to read "'identifying information' means information that identifies an individual."

Remove the override of the Freedom of Information and Protection of Privacy Act, and in particular delete clauses 8(1) to 8(5)

Clause 43(e) should be deleted

Clause 46 should be deleted.

Clause 106 (b) should be deleted to eliminate possible prosecution for attempting to gain access to health information. Failing that, there should be an exception for newsgathering to protect journalists' charter rights.

Consequential amendments to Bill 89 should be made as required to accommodate the above.

Thank you for your interest. I am available to address the committee should you wish and despite the late hour. I can be reached at 402-8202.

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