



Dear Mr. O'Connor,

Thank you for taking the time to respond to our "Three Promises" document last week. As you may have seen, today we released the responses from all three major parties. Although the NDP was the only party which did not endorse our recommendations, we appreciate that you took the time, in the midst of a busy campaign, to substantively engage on these issues and so we would like to provide a response to the concerns you raise.

1. On expanding the mandate and power of the Review Officer:

Your chief objection to this change seems to be that it will have a negative impact on the cost, speed and efficiency of the oversight process. We believe the reverse is true. In practical terms, there is no reason why making the Review Officer's decisions legally binding should complicate the investigations process. The experience of other jurisdictions is that binding decisions enhance cooperation from public bodies, thereby speeding up the review process. In the United Kingdom, for example, where the oversight body has order powers, the vast majority of all appeals are processed within three months. Order-making power also removes the discretion that public bodies currently have to ignore her recommendations, including as to procedural matters.

Your response also notes that the current law "enables Nova Scotia to consider a wide range of citizens, such as journalists, for appointment to the position of Review Officer". While the current Review Officer has a law degree, we are aware that previous Review Officers (Darce Fardy) did not. In jurisdictions around the world, oversight bodies with order-making power are staffed by non-lawyers. Regardless of whether the office is granted order-making power, it is critically important that the Review Officer should be someone who is competent to make decisions about access to information. If a candidate lacks the competency to make these decisions, then that person should not serve as the Review Officer regardless of their educational or professional background.

2. On timelines:

We acknowledge that Nova Scotia scored highly on the 2012 Freedom of Information Audit. However, it is worth noting that, in being measured against

other Canadian jurisdictions, the comparison is among a relatively weak peer group. Moreover, the Review Officer has noted that recent years have seen a large increase in the number of both extension requests and extension-related complaints by requesters. We welcome your commitment to consult with FOI Officers and the Review Officer to ensure that extensions are being used appropriately, and your acknowledgement that extensions beyond 60 days should be a rarity. But setting firm time limits is better practice. Such rules are in place in many countries, where they have kept the response time short, to the benefit of requesters.

3. On solicitor-client privilege:

We recognise that this is probably the most difficult of our three recommendations to carry out, since this is deeply ingrained within the culture of government. Solicitor-client privilege is, as you note, “an important principle of the common-law”. However, there are important differences in the nature of the solicitor-client relationship as regards government lawyers. Solicitor-client confidentiality exists for two reasons, to allow lawyers to plan their strategies for upcoming litigation (litigation privilege) and to promote candour between lawyers and their clients. While the first of these is clearly necessary for government lawyers, since governments are frequently involved in litigation, the second is not, or at least is not over and beyond the protection already provided by other exceptions (for example to preserve the free and frank flow of information inside of government).

When public officials deliberate with government lawyers they do not need the protection of secrecy to protect their communications; they are not confessing their involvement in criminal enterprises or their infidelities, they are merely conducting government business. Moreover, government counsel often play a range of roles in policy development, planning and administration which are functionally similar to those of their non-legally trained colleagues. It is difficult to see why protection should apply to this advice just because it happens to come from a lawyer. Furthermore, the solicitor-client privilege exception as currently worded provides tremendous potential for abuse since, if government officials want particular discussions to be exempt from disclosure, all they need to do is bring a lawyer into the room.

Although we may not agree on the substance of the changes that are required, I want to express once again our appreciation that you took the time to respond substantively on this. Whether Tuesday’s election finds your party returning to government, or in opposition, we hope that you will consider our ideas, and that you will work to improve transparency in Nova Scotia.

Best wishes,

A handwritten signature in blue ink, appearing to read 'M. Karanicolas', with a stylized flourish at the end.

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