



February 26, 2021

**RE: THE PRODUCTION OF THE IRAC REPORT TO THE STANDING COMMITTEE ON HEALTH AND SOCIAL DEVELOPMENT**

To the members of the Standing Committee on Health and Social Development:

Despite numerous requests by the Standing Committee on Health and Social Development and others, members of the Legislative Assembly have been unable to obtain a copy of the IRAC report produced for the Minister of Agriculture and Land. We believe now is the time to subpoena a copy of the report for the reasons provided below.

**Powers of the Legislative Assembly**

Chapter 3 of the *House of Commons Procedure and Practice, Third Edition* discusses the privileges and immunities of the House. As it points out, section 18 of the *Constitution Act, 1867* provides the Canadian Parliament with broad powers similar to those of the UK.<sup>1</sup> As our own *Legislative Assembly Act* provides in section 10, the PEI Legislative Assembly has the same privileges, immunities and powers as the House of Commons.<sup>2</sup> Our Legislative Assembly equally has the power to compel the production of records under section 12 of the *Legislative Assembly Act*:

**12. Committee commanding attendance**

(1) *A committee of the Legislative Assembly may, by order at any time, command and compel the attendance of the persons, and the production of the records and things, before the committee that the committee considers necessary.*

**Warrant or subpoena**

(2) *For the purpose of subsection (1), the committee chair may issue a warrant or subpoena directed to the person named in the warrant or subpoena requiring the attendance of that person, and the production of any records and things indicated in the warrant or subpoena, before the committee.*<sup>3</sup>

<sup>1</sup> Section 18 of the *Constitution Act*: "The privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities, and powers shall not confer any privileges, immunities, or powers exceeding those at the passing of such Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof."

<sup>2</sup> Section 10 of the *Legislative Assembly Act*: "In addition to the privileges, immunities and powers conferred by this Act, the Legislative Assembly and its committees and members hold and enjoy the same privileges, immunities and powers that are held, enjoyed and exercised by the House of Commons of Canada and its committees and members."

<sup>3</sup> Available here: <https://www.canlii.org/en/pe/laws/stat/rspei-1988-c-l-7.1/latest/rspei-1988-c-l-7.1.html>

The power of parliamentary bodies to compel the production of records and things is one of its most fundamental powers. The scope of these powers were examined in the House of Commons in 1991, in circumstances that mirror our own.

### **Privacy vs. the Power of Production**

In 1991, the Solicitor General of Canada refused to provide an unredacted report to the Standing Committee on Justice and the Solicitor General. The Solicitor General argued that he had an obligation under the Privacy Act to not provide the unredacted report, which contained personal information.

A point of privilege was raised in the House and the matter was referred to the Standing Committee on Privileges and Elections (“the Committee”) for consideration. The Committee heard representations from the Department of the Solicitor General, from the House of Commons’ general legal counsel, from the Privacy Commissioner, and from legal experts as to whether the Solicitor General was required to provide the document as requested.

In its findings, the Committee cited the fifth edition of Beauchesne’s Rules and Forms of the House of Commons of Canada, which stated: “Committees may send for any papers that are relevant to their Orders of Reference. Within this restriction, it appears that the power of the committee to send for papers is unlimited.”<sup>4</sup> The Committee also wrote in its report:

*“The power to call for persons, papers and records is **absolute**, but it is seldom exercised without consideration of the public interest. The House of Commons recognizes that it should not require the production of documents in all cases; considerations of public policy, including national security, foreign relations, and so forth, enter into the decision as to when it is appropriate to order the production of such documents.”<sup>5</sup> (emphasis added)*

As the Committee noted, this power is “central to the ability of parliamentary committees to discharge their responsibilities.”<sup>6</sup> The Committee also noted that most witnesses agreed that a formal order of the House to produce an unredacted report to the Standing Committee on Justice and the Solicitor General would prevail over the *Privacy Act*.<sup>7</sup>

### **Considerations arising from the FOIPP Act**

Provincially, the *Freedom of Information and Protection of Privacy Act* lays out the circumstances in which a public body, such as the Department of Agriculture and Land, may disclose personal information. It is worth noting that public bodies are *authorized* to disclose personal information for the purpose of complying with a subpoena, warrant or order:

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<sup>4</sup> See page 1:7, “Minutes of Proceedings and Evidence of the Standing Committee on Privileges and Elections”. May 27, 1991. [https://parl.canadiana.ca/view/oop.com\\_HOC\\_3403\\_86\\_1/5?r=0&s=1](https://parl.canadiana.ca/view/oop.com_HOC_3403_86_1/5?r=0&s=1)

<sup>5</sup> Ibid.

<sup>6</sup> Ibid, page 1:8.

<sup>7</sup> Ibid, page 1:9.

### **37. Disclosure of personal information**

- (1) A public body may disclose personal information only
- (f) for the purpose of complying with a subpoena, warrant or order, issued or made by a court, person or body having jurisdiction in Prince Edward Island to compel the production of information, or with a rule of court binding in Prince Edward Island that relates to the production of information;<sup>8</sup>

To this end, we believe the Department of Agriculture and Land is authorized to release the IRAC report to comply with a subpoena of the Standing Committee on Health and Social Development.

Furthermore, the *Freedom of Information and Protection of Privacy Act* does not apply to the Legislative Assembly in any event<sup>9</sup>, and the same Act “does not affect the power of any court or tribunal to compel a witness to testify or to compel the production of documents”.<sup>1011</sup>

### **Achieving a Balance Between Privacy and Accountability**

Though the federal Committee had determined that the power of Parliament to compel the production of records prevailed over the provisions of the *Privacy Act*, it is still evident from their work that it is desirable to protect personal and privileged information to the extent that it is possible.

Accordingly, the Committee provided suggestions that would address privacy and confidentiality concerns while preserving the power of parliamentary bodies to access the records they requested. One such example was to make documents available at an *in camera* meeting “with suitable safeguards to prevent the unauthorized release of information.”<sup>12</sup>

In our view, this would be a suitable approach in the context of the PEI Legislative Assembly. Rule 104(3) of the *Rules of the Legislative Assembly of Prince Edward Island* establishes that *in camera* meetings are protected by privilege and it is an offense to publish their proceedings.<sup>13</sup>

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[https://www.princeedwardisland.ca/sites/default/files/legislation/f-15-01-freedom\\_of\\_information\\_and\\_protection\\_of\\_privacy\\_act.pdf](https://www.princeedwardisland.ca/sites/default/files/legislation/f-15-01-freedom_of_information_and_protection_of_privacy_act.pdf)

<sup>9</sup> See clause 4(1)(d) of the *Freedom of Information and Protection of Privacy Act*.

[https://www.princeedwardisland.ca/sites/default/files/legislation/f-15-01-freedom\\_of\\_information\\_and\\_protection\\_of\\_privacy\\_act.pdf](https://www.princeedwardisland.ca/sites/default/files/legislation/f-15-01-freedom_of_information_and_protection_of_privacy_act.pdf)

<sup>10</sup> See clause 3(a) of the *Freedom of Information and Protection of Privacy Act*.

<sup>11</sup> The Legislative Assembly has all the rights and privileges of a court of record for certain purposes under section 14 of the *Legislative Assembly Act*. While it arguable whether these purposes are related to and include the matters presently before the Standing Committee on Health and Social Development, a primary intent of section 3 of the FOIPP Act appears to be to prevent the frustration of a body's power to compel the production of documents.

<sup>12</sup> See page 1:9, “Minutes of Proceedings and Evidence of the Standing Committee on Privileges and Elections”. May 27, 1991. [https://parl.canadiana.ca/view/oop.com\\_HOC\\_3403\\_86\\_1/5?r=0&s=1](https://parl.canadiana.ca/view/oop.com_HOC_3403_86_1/5?r=0&s=1)

<sup>13</sup> Rule 104(3): “When a committee sits in camera, its proceedings are protected by privilege. Any publication of its proceedings, either in written or verbal form, is an offense with which the House may deal.” Rules of the Legislative Assembly of Prince Edward Island. June 2019.

We believe reasonable steps could be taken to prevent the unauthorized disclosure of sensitive records, including the use of physical documents instead of electronic documents, and “confiscating” electronic devices with recording capabilities for the duration of an *in camera* session.<sup>14</sup>

### **Regarding the Advice Sought by the Minister**

We would like to briefly discuss the Minister of Agriculture and Land’s request to the Information and Privacy Commissioner for advice and recommendations on the release of the IRAC report. Though a public release of the report was not explicitly expressed by the Minister in his request to the Commissioner, it is clear from reading the advice and recommendation report (“AR”) that the Minister’s request was considered in the context of the Minister’s public statements and “intention to release the Record to the public”<sup>15</sup>, as well as the relevant facts provided by the Department of Agriculture and Land to the Commissioner.<sup>16</sup>

At no point did the Minister request advice and recommendations on the release of the report to the Legislative Assembly or its committees with the appropriate privacy safeguards in place. As Murray Rankin, one of the federal experts engaged in the federal Committee’s review, noted in his submission:

*“It should be also be [sic] noted that Mr. Grace, the then Privacy Commissioner, at no time was called upon to address a possible release of the full reports to the Committee ; he was called upon only to consider the release of the entire report to the public. Had he been asked about the proposal to release the full reports to the Justice Committee on an in camera basis, he would have supported such a disclosure.”<sup>17</sup>*

We view the Minister’s failure to make such inquiries as disappointing.

Regardless, the Minister argues that “[t]he Information and Privacy Commissioner is an Officer of the Legislative Assembly and [he] must respect and follow her recommendations”<sup>18</sup>. The position taken by the Minister fails to recognize that the Legislative Assembly has “exclusive jurisdiction in respect of the determination of the lawfulness of its proceedings, the regulation of

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<sup>14</sup> In the context of the federal committee in 1991, the safeguards proposed included *in camera* meetings, “without transcription, without staff, with unvetted copies of the report made available, without photocopies taken, and with copies of the report being taken back from the committee members and kept in the custody of the CSC.” See page 1A:8, “Minutes of Proceedings and Evidence of the Standing Committee on Privileges and Elections”. May 27, 1991.

[https://parl.canadiana.ca/view/oop.com\\_HOC\\_3403\\_86\\_1/24?r=0&s=1](https://parl.canadiana.ca/view/oop.com_HOC_3403_86_1/24?r=0&s=1)

<sup>15</sup> AR-21-001 Re: Department of Agriculture and Land, at para [8]. January 5, 2021.

[https://docs.assembly.pe.ca/download/dms?objectId=b243d758-f4fb-424d-8525-3a33e4637217&fileName=Report%20No.%20AR-21-001\(amended\).pdf](https://docs.assembly.pe.ca/download/dms?objectId=b243d758-f4fb-424d-8525-3a33e4637217&fileName=Report%20No.%20AR-21-001(amended).pdf)

<sup>16</sup> In particular: “The Public Body intends to publish the Record on their website for public consumption and review;”. Ibid, at para [11].

<sup>17</sup> See page 1A:8, “Minutes of Proceedings and Evidence of the Standing Committee on Privileges and Elections”. May 27, 1991. [https://parl.canadiana.ca/view/oop.com\\_HOC\\_3403\\_86\\_1/24?r=0&s=1](https://parl.canadiana.ca/view/oop.com_HOC_3403_86_1/24?r=0&s=1)

<sup>18</sup> See letter from Minister Bloyce Thompson to Mr. Gordon McNeilly “Re: Invitation to appear before the Standing Committee”. February 19, 2021.

its proceedings and the conduct of its business and affairs.”<sup>19</sup> In other words, it is not the Information and Privacy Commissioner who determines what is appropriate and lawful for the Legislative Assembly to do—that is for the Legislative Assembly itself to determine.

### **Toward the Need to Subpoena**

In his correspondence to the Chair of the Standing Committee on Health and Social Development, the Minister writes: “The relationship between Government and Committees of the Legislative Assembly has been defined by cooperation and openness.”<sup>20</sup>

Respectfully, we disagree. Responses by the Minister to various committees have been slow and underwhelming, and despite the best efforts of Standing Committee members to offer solutions balancing the desires for accountability and the protection of privacy, the Minister has failed to engage as a productive partner.

We are left with no choice but to subpoena the records in question, which is within the legislated authority of the Standing Committee.

Sincerely,



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MLA for District 23



Hannah Bell  
MLA for District 11



Michele Beaton  
MLA for District 5

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<sup>19</sup> See subsection 10(2) of the *Legislative Assembly Act*.

<https://www.canlii.org/en/pe/laws/stat/rspei-1988-c-l-7.1/latest/rspei-1988-c-l-7.1.html>

<sup>20</sup> Letter from Minister Bloyce Thompson to Mr. Gordon McNeilly “Re: Invitation to appear before the Standing Committee”. February 19, 2021.