

Transcript Episode 23: Tricia Ralph

Ron Kruzeniski:

Today, we're talking to Tricia Ralph. She is the Information and Privacy Commissioner for Nova Scotia. She was appointed in 2020. Shortly after she was appointed, I had indicated that I wanted to do a podcast with her to talk about amendments in Nova Scotia. And we're going to talk about comments her Premier made when initially elected. But the Premier didn't make those comments right away, so we kept postponing this podcast. But here we are in 2024 and it's time to talk about Tricia's submission for suggestions for amendments to freedom of information legislation in Nova Scotia. Welcome, Tricia.

Tricia Ralph:

Hi Ron. Thank you for having me.

Ron Kruzeniski:

Now, before we get into the details, I wonder if you would tell us a little bit about yourself and what you did prior to being in Nova Scotia and how you got appointed as Commissioner in Nova Scotia.

Tricia Ralph:

Sure, Ron. So, I've had many career aspirations, I'll say in my life. I grew up in Ontario, that's where I'm from. When I went to university, what I really wanted to do was health related stuff. I have a Bachelor of Science actually, which I don't use, but that's where I started. And then I worked at a hospital while I was going to school and that piqued my interest, not just in the clinical part, but in the administrative part of healthcare and policy and that kind of thing. So, I came out here to Halifax and I did a Masters in Health Administration, it's called. And while I was there, I wanted to be in school longer, just kidding.

I found another program, which was that you could do this Masters combined with law. And so that's what I did. And for both of those, I focused a lot on health. I have a specialty in health law and that kind of thing. So that's how I started, and I articulated and did all that stuff as a lawyer. And then I moved up to Yellowknife, and at that time I wanted to use my Master's degree more than my law degree. And so, I was working for a government department there, the Department of Education, policy style work. And in that role, I was responsible for the ATIP, Access to Information program for education.

As you can imagine, access to information in the education system in the north is particularly sensitive. And it's sensitive because we were getting requests for information related to residential school issues and also in response to a lot of civil claims because there was a tragic history of abuse of children in the Northwest Territories in Nunavut where I did some of my work as well. So even back then, I was working not on the regulator side, but for government. And it was an issue and it really was something I hadn't thought about before I started in that job. I didn't really realize the importance of access to information and how pervasive it was in government.

And so, I did that work for them and then I moved over to the Department of Justice and started using my law degree. And when I did that again, I wanted to get back to the healthcare and it just so happened that right around that time, the government of Nova Scotia had started their health information legislation. And so, very quickly I got thrown into that and that added to my access from experience and pushed me towards the privacy side. And so, I did that for a number of years. And then right near the end of my term, I had left the government of the Northwest Territories and I started working for the previous Commissioner up north. Her name was Elaine Keenan Bengts.

Sadly, Elaine passed away a few years ago, but she was really my impetus and my mentor in this regard. Because I remember going and appearing in front of her and being so intimidated and so impressed by her. She was really a formidable lawyer and a Commissioner. And when I got that opportunity to do some work for her, it didn't take much twisting in my arm, I jumped right over to work for the regulator side of things. And she was the one who told me about this job in Nova Scotia and she encouraged me to apply and I did. And to my surprise, I was successful. So that's how I made it here.

Ron Kruzeniski:

And here you are four years later. So, after being appointed, did you set for yourself some goals that you wanted to achieve during your term as Commissioner?

Tricia Ralph:

Yeah. I'd wanted to focus on some of those things that I had my background in, which is particularly for me, health related. And a big one for me is not only privacy in the healthcare health field setting, but also access to information. And I have a really strong belief that we need to put more information in the hands of patients in the healthcare system. And so, I was hoping to focus on some of that. But the reality in Nova Scotia is that I walked into a four-year backlog for our access file. And we've always had a backlog here. In my opinion, this office has been underfunded, significantly underfunded for a long time. And so as soon as I got here, I thought, "Oh, well, this is something I'm going to have to deal with."

And my last four years has been a lot of time trying to get more resources. So, we really have to focus on that and it takes away from my ability to focus on any other goal. And the other thing that I've narrowed down my two goals to essentially is the legislation. So, the legislation still hasn't been updated since about 1994 here at Nova Scotia. And the previous Commissioner, Commissioner Tully, she really focused on the need for amendments and so I picked up on that as well because those are the really two primary issues facing our office. There's a whole bunch more that I would like to look into, but right now we are very reactionary, we are not proactive because we can't be and we don't have the staff and we don't have the resources to do anything proactive.

And I always kind of chuckle about this, but when I got appointed, one of the first newspaper articles was, the headline was something along the lines of new Commissioner, same old problems or something like that, and same old story I think it was. And that's because that was the big focus of the previous Commissioner too, right? Resourcing and legislative change. And so, I'm essentially saying the same thing, and those are the biggest issues facing our office. I would like to be more proactive and delve into some deeper issues, but that's where we're at right now. We're still trying to get that sorted.

Ron Kruzeniski:

So, you recently have done a submission regarding legislative change, and I want to get to that. But before I do, I recall that your current Premier, after he was just elected, made certain statements or promises regarding changes in the access and privacy world. Do you recall briefly what promises he made?

Tricia Ralph:

Yeah. Well, if you don't mind Ron, I might step back to two Premieres ago because this has come up a couple of times. It's interesting how it's happened in Nova Scotia. So, I think it's fairly common for elected officials to focus on the need for more access to information when they're in opposition, and then maybe pull back a little bit once they get into office because it's a lot harder to respond to access to

information requests than to make them. So, with our previous Premier, his name was Stephen McNeil, one of his campaign promises was to give order making to our office.

But after he got in, he wrote a letter to Centre for Law and Democracy, or sorry, prior to him coming in, he made this letter said promising that he would give order making power. But after that he was challenged on that and he was infamously said that that letter was not a promise but a mistake. And there's even a little hashtag that goes around, not from us, but from other members of the public who have made this hashtag of mistake, not a promise. And I say that because the same thing that is happening, I'm hoping that it's not going to be quite the same now, but similar with our current Premier Tim Houston.

He also talked about this in his campaigning, and he has quite an interesting perspective because during the time when he was in opposition, he'd asked for information from the McNeil government and they'd said no. And it was about a ferry, it was all before my time, it was about some fees spent on ferries. And Commissioner Tully had recommended the information go out and the recommendation was not accepted and an unusual move, they took this matter to court. And then the court said effectively the same thing as Commissioner Tully.

So, I found that interesting because he's had that exact experience of going through an access to information request and how challenging it can be. So then when he came in, he did, unlike anything else that we've seen in our province, Premier Houston put this request to give us order making in his public mandate letter. It was one of the first few mandates that he gave to the Minister of Justice. So, he's given the minister a directive to amend legislation to give us order making power. So, there has been a little bit of pulling back in recent news articles about the order making piece, but the mandate letter has been followed. Currently going on, why I'm here today is there is a current review into the legislation with the hopes of making legislative changes to our FOIPOP.

Ron Kruzeniski:

And again, before we get to the highlights in your submission, and you touched on it, when was Nova Scotia's access and privacy information first introduced? Has it been amended very much since that time?

Tricia Ralph:

This is going to be a long answer because it's a convoluted story. Nova Scotia was originally, rightly so, considered a leader in access to information laws in Canada. It was the first jurisdiction to enact a piece of legislation in 1977. And then in the early 90s, they scrapped that and replaced it with our current act that we have today. So, it was drafted in 1993, I think it came into force either 1993 or 1994. And since then, there hasn't really been a lot of amendments to that. But that's also not the full story because what has tended to happen more is that the legislators have added on pieces of legislation to it as opposed to amending it itself.

So, it has not, in my view, hasn't had any changes since 1999, I think. And even before that, anything was not really substantive, it was more catching errors and that kind of thing. But in 1999, they did make a change where they had this legislation applied to municipal bodies and not just public bodies, provincial governments and that kind of thing. So, instead of putting that into the current FOIPOP, they added it on to Municipal Government Act. So, it's all encapsulated in there. And then in 2006, they created this act called the Personal Information International Disclosure Protection Act. And it's all about dealing with information, taking information and storing information outside of Canada.

And then two years later, they made the Privacy Review Officer Act, which is essentially an act that gives my office investigatory powers for privacy because the FOIPOP itself doesn't speak to investigations of

privacy, it's all about access. And so, they create this other act that says, "Oh, and by the way, she can do all of this stuff with privacy as well under FOIPOP." And then in 2013, our health legislation came into force our Personal Health Information Act, and that's the last one I believe. And so, we describe this and I think understandably as a confusing array of privacy laws, and it makes sense for sometimes them to be separate.

Like typically health information laws are separate from public sector legislation. It's just a different kind of issue in some ways. But we don't think that all of them should be that separate. And there's been some errors, actually some inconsistencies, I think inadvertent ones that don't make a lot of sense in between some of the pieces of legislation. So, that's one big thing we're asking for, just put it all together. It's confusing for us, it's confusing for the public, it's confusing for public bodies. You got to look at multiple acts to figure out what you're doing, and it's just easier to see it as one.

Ron Kruzeniski:

So, from that I can anticipate some of what is in your submission recommending a consolidation of the variety of statutes that have access or privacy wording or provisions in it. So now, coming to your submission, what would you be able to label as the top three or five items that are important that you really think should change as soon as the government is willing to do so?

Tricia Ralph:

There's a number, but I'll focus down to the top three or five, as you said. And a couple of them are really not controversial. I don't think anyone's arguing with us that these things should happen and one of those is mandatory privacy breach notification. So, most modern pieces of legislation have a mandatory requirement that the public body or the holder of the information tells the person who the information is about, if there's been a privacy breach related to them. And for example, we already have it in our health information legislation because it's been recognized for a long time that that's just a given that you should have to do that.

And we sometimes get pushback here of all various public bodies, they have policies and stuff that tell them to do that, but we think it needs to be in the law. There shouldn't be any room there for making decisions that might not be in the best interests of citizens. And public bodies, the governments are collecting so much information now, so much personal information. And that's right, they need to, to perform their services, but citizens should have that comfort of knowing that if something goes wrong, they're going to know about it. And so, that's a big one that we put in there.

Another one, it comes back to the confusing array of laws that we have that I was just speaking about is when I talked about that act that came in, the PRO Act we call it, Privacy Review Officer Act. It comes in and that's the one where it says, we're going to give you all these privacy investigation powers. But for whatever reason, it says that it applies only to FOIPOP, meaning public bodies like provincial governments, but not to the whole municipal bodies. And I think that was an error, I don't know, or just missed it by accident. We were never consulted or informed about when PRO came in, it was before my time, but that's my understanding.

And so, we weren't able to comment on that and I to this day, don't really know why. And the reason I think it's an oversight issue is because there doesn't seem to be, I can't think of myself anyway, a rational reason why you'd say, "Okay, well we can do a privacy investigation for provincial government, but we can't do one for the police, like any municipal body." So, that's one that we've recommended. Another big privacy one that we talked about is really just advances in technology. So, generative AI, biometrics, all those sorts of things. We've left that recommendation pretty broad in our submission.

And the reason for that is because I think this is going to be a tricky balance for legislators to deal with these advances in technology. They're coming, we need them, it's going to happen, but how do we draft laws that put checks and balances on that in a way that the law also doesn't have to change every time the technology changes. The laws have to be written in a way that can withstand some change like that in technology. And so, we left that recommendation pretty broad to say, you need to look into this and how are you going to address it? It's new for all of us, all the Commissioners across the country, relatively new I'll say.

So, it needs to be looked at, but I didn't specifically say, "Oh, you should do this exactly," because I think that that's something that they have to look into quite a bit. We gave some minor ones like put a definition in or whatever, but generally we're saying, "Look, you got to deal with this, and you got to make sure that when you're using these programs and these new advances that you're doing it in a privacy protective way." So, another big item that we're asking for change on Ron is to do with order making. And so, in Nova Scotia, we have recommendation making power, meaning that we can only make recommendations about what public bodies should do in terms of releasing information. But the trend now is for governments to do an order making model.

And I agree with that. I understand why when this legislation first came out in the 90s, and why we were looking more at a recommendation model because it was new and it was an innovative field, what are we going to do? But the legislation's been here a long time now. And I also think that just the nature of our work, particularly with freedom of information, doesn't really lend itself to a recommendation model. And I say that because we're making these really technical analyses. Was the information allowed to be withheld or not? This is what the law says, this is what the records say, this is what people's arguments are. Can they withhold it or not?

It's not like, "Oh, well maybe, maybe that would be the case so we're going to recommend that." It's really technical and I always compare it to the Auditor General who's typically making more broad stroke recommendations. Like, "You need to look at this program area, or I recommend that you put performance indicators in place," or all those kinds of things. That to me lends itself more to a recommendation model where we're saying, "Did you comply with the law or not here?" And I don't think that that lends itself to a recommendation model. In terms of what we're asking for, for order making, I've generally said we're open to any form of order making, but really there's only two forms.

Direct, straightforward order making. We issue an order and that's how it ends. Or the Newfoundland model, which we call the reverse onus order making model. And so, that's the one where the Commissioner still has recommendation making power, but if the public body is not going to follow the Commissioner's recommendations, they're the ones that have to go to court. So, they have to go to court and they have to establish their position. And that's really what we're looking for the most here in Nova Scotia because our thought is that it's a big deal for a member of the public to take on a big government like a municipal government or a provincial government to court and say, "You have to give me this information."

And on top of that, they're in the dark a little bit on it. They haven't seen the record and they don't have the knowledge and the background to really have a ton of ability to challenge it. And most importantly, the law says that the burden is on the public body to show why and how they can withhold it. And so, we think that it needs to be their job, they have to be the ones to defending it, it shouldn't be on the member of the public do that. And that's how the Newfoundland model works, public body goes to court and says, "The Commissioner is wrong, and this is why we think it still has to be withheld."

As opposed to what currently exist, which is, if the public body doesn't agree with what I've said, they say, "No, we're not going to accept your recommendation." And it ends there unless the member of the public has that capacity to take on the public body. And that's not very common, it doesn't happen a lot.

Ron Kruzeniski:

Right.

Tricia Ralph:

One other thing I just wanted to touch on, Ron, if we have time, is something else we put in relation to the order making in our submission is about requiring public bodies to give explanations when they're rejecting the recommendations. So, the way that it happens now is we issue a recommendation and typically the public body says, "Thank you, we respectfully disagree and we won't be following your recommendation." And that's pretty common, I think across the country. Yukon had a really interesting case in the last year or so. It was called VinAudit versus the Yukon government. And they recently amended their legislation and they put in a provision that says, "You can't just reject the recommendation, you have to explain on what grounds."

In this case, there had been recommendations made through the office of the Information and Privacy Commissioner and the Commissioner or the adjudicator for the Commissioner wrote a detailed analysis and all of these things. And at the end of the day, the public body said, same thing that we get, "Thank you, we respectfully disagree." And the court had really strong language in response to that, and the difference is that public bodies in Yukon have this requirement to give reasons which we don't. And so, the court said that when you just disagree, doing so does not provide a transparent, intelligible, justifiable and reasonable basis for rejecting the Commissioner's findings and recommendations.

The court said that the response was perfunctory and bordered on contempt towards the right of citizens to information, the law itself and the office of the Commissioner. And this really resonated with me in Nova Scotia because I harken back to it's not a requirement. So, it's not like public bodies are not doing this because they don't feel like it, they don't have to, they're not required to right now. And we asked for this similar wording that Yukon has because we think it's important regardless of the model that you have, that the public body really be put in a position of not just saying at the outset, "This is why we think we can withhold it."

But responding to what the Commissioner does and says in their report because they go in and say, "Okay, I've heard your arguments and this is my analysis." But without the Yukon model, there is no requirement for any rebuttal of what the Commissioner said. That's why you need it, so at the end of the day, the applicant understands, "Oh, okay, this is why they're doing it. This is why they think that the Commissioner is wrong. This is why they think they can do this." And so, that's a big one that we've asked for and I think that's relatively new and I found that case really interesting out of Yukon and I think that there's a lot of good bits in there. And I think those were my top three or five, Ron.

Ron Kruzeniski:

Excellent. Now, on your last point, I think administrative law generally requires a decision-making body to give reasons. And I certainly have been thinking about that lately in terms of the public body's response, whether there's just an obligation under administrative law to give reasons. Have you thought about that?

Tricia Ralph:

No, I haven't, but I wish I had thought about that before now. That is a really good point, Ron, and another one that I want to talk about, which is possibly the most important one that we've made some recommendations on, which is related to independence. And I agree with you that that's a possibility. The most important and the biggest issue that we're asking for change on that I haven't spoken about yet is in relation to our independence. And one of the things that I was going to talk about in that regard

is we don't have a provision in our law that says we're allowed to establish our own procedures for what we do.

And so, what happens is if we were to say, for example, the law doesn't say this, but we're going to require you to give reasons because there's administrative principle in that regard, and that's what we're going to go with. I know that we would get pushback on that because we get pushback anytime that we make any change to our process, so any time we do it. And I find that fairly shocking to be honest, because we're independent and I don't understand where this sentiment comes in that, oh, we're allowed to challenge the Commissioners processes that she makes.

An example of this that we had one time is in very rare circumstances we can expedite a file to the top of the list. And expediting is a big deal here because we have this four-year backlog. So, one time we decided to expedite a file and the public body called us up and said, "Well, how do you have authority to do that? How do you have the right to decide which file you're putting to the top of the list?" And that took me aback to be honest, and we just said, "Well, it's our authority." But it would be a lot more helpful if there was a specific provision that said that.

So, even in the context of administrative law might require you to do this or might require the public bodies to do it, I still think, and it's the same with mandatory breach notification. Just put it in the law, there's no question about it, we don't have to have this debate every time. And I think that would solve a lot of problems.

Ron Kruzeniski:

Well, you anticipated my next question because I was going to ask you, what do you feel was the most important change or amendment? And I take it that aspect of greater independence is pretty high up there in terms of priority.

Tricia Ralph:

Yeah, I left that one for the end because it's pervasive amongst everything we do. And just to have a little step back, in Nova Scotia, my position, the Commissioner's position is not one of an independent officer of the legislature or the House of Assembly, whereas that's the case in every other jurisdiction is my understanding. So, there's the one that I just talked about, that questioning of our authority to set our own processes. But the biggest one I think for me is that we don't have financial independence. This one, I have to be specific to the provincial government because they're the ones that give us this money, so I'm going to speak specifically to them.

So, we don't have financial independence from them, but we also oversee them. So, when I ask for more staff, it goes up through the Department of Justice, which is a department that I oversee and I should say staff through the vehicle of a budget submission. But those budget submissions, they get cut off, they're treated as a departmental submission, not as an independent body submission. So, they get cut off before they even go into that process that we all see on the news with debating what budget should be spent on and that sort of thing. My budget requests don't get to that process, they get knocked down, I guess I'll say before that.

And so, there's no golden ticket to being independents in terms of ensuring that you're going to get your financial ask. But we think it's important that the public knows and opposition parties know what our asks are and that they're debated at that level, not debated at all because they don't even get put forward. So, that's a big one for us in terms of the independents. The other part is about hiring and classifying our employees and paying for experts, and I'll focus on the expert piece. So, if we had a major privacy breach and we needed someone like a lawyer or a technical person to give us some advice and analysis because we don't have true lawyers and technical experts on our payroll. I have to go ask the

government for that money, and it's usually them that I'm asking for the money so that I can investigate them.

You can see, and I'm not saying that decisions are being made, "Oh, we're going to withhold this from her, so she can't do the investigation," that's not what I'm saying. But it's just the appearance of that alone. They're particularly put in a hard spot because did I come and make some outlandish request that they rightly should push back on? Even if they do, there's that appearance that there's an insidious reason for doing so. And again, I'm not saying that there is, but it's just an appearance issue and I don't think it's appropriate that we be asking public bodies that we're investigating for enough money to do so.

Ron Kruzeniski:

So, you've made your submission and I presume now it's in the hands of the government. I guess it's a bit of a guess as to the timelines that will occur?

Tricia Ralph:

We have a little bit of information; we don't know for sure. The mandate letter that I talked about earlier directed the minister to amend the laws within their four-year term. So, the mandate letter was 2021, so that would mean by 2025. We've seen in other news articles that the intention is that the committee is supposed to give its report to the minister this spring, so not too long from now, sometime in spring 2024. And then their goal is to introduce legislation no later than Spring 2025.

Ron Kruzeniski:

Will you get a chance to make an oral presentation to the committee?

Tricia Ralph:

Yeah. So, we have met with them once or twice already here, and we've given them our written submission. And actually, at the end of our submission, there's a bunch of little non-controversial changes that we think should be made actually address some of those issues that I was talking about earlier. And so, we didn't set them all out in the submission, we're going to meet with them here shortly, and we were really happy. They've been really open to that I'll say, they keep saying, "Yes, we'll meet with you," and we're absolutely going to take them up on that offer.

And we are really thankful for that because as we already have the one example that I talked about where a legislative change was made that possibly might not have been made had we been able to give some input.

Ron Kruzeniski:

So, moving away from legislation and looking at things broadly, any thoughts or comments re: the overall culture and approach and attitudes toward access and privacy in your province?

Tricia Ralph:

Yeah, I'll talk about access more. I think this is common to all public bodies across the country. People are asking for more and more information, and it's a lot of work and public bodies and governments, this is a challenge for them. It's a challenge for them, and it's a challenge for us because there's so much information out there now. We're not dealing with typewriter letters, that was the case when these

laws were drafted. Our law was drafted before Google was created. It was drafted a long time before Facebook or any of those things, any of those other programs that you use.

So, we just have more information to go through and I think it's important to not lean into that sentiment of, "Oh, it takes so much time and we have other major issues like, look what's going on in our country. We have these major crises with regards to healthcare and housing and cost of living." And I think it's easy to fall back and say, "We got to prioritize that stuff and we can't deal with this other freedom of information issues." But this is all also happening at a time where we have AI and we are in this brand-new landscape of how's this going to play out for us and what does it mean?

And I think right now what we know is a serious problem is that there's a lot of ways that AI can produce misinformation and disinformation and that it is being produced and not just through AI, through all kinds of different ways. And so, there's a real, since Covid and all those kinds of things, there seems to be this increase in distrust of governments and perhaps some conspiracy type thinking. To me, I think that the response to having to do so much work in this regard isn't to pull back, it's to give more information. The way to combat any misinformation or disinformation that's out there is to show and to give that information out.

No, this isn't a secretive thing that we've done, here's the information to show you this. I think it's one of the most important times in our history possibly and we really have to lean into that. And I do want to read two very short quotes. So, one is John F. Kennedy, and this was in 1961 at one of his press release dinners. And he said, "No president should fear public scrutiny of his program. For from that scrutiny comes understanding, and from that understanding comes support or opposition and both are necessary." And then the other one that I want to read is from Nova Scotia from the Minister of Justice when they were introducing this law.

And he said, "Let me say now, this government would rather be criticized for something contained in information and releases than be criticized for not releasing the information. We can move forward from criticisms for mistakes, but no government can advance its program under a cloud of suspicion." They were saying it back then, and it's still true today.

Ron Kruzeniski:

I think you should frame those and put those on your wall.

Tricia Ralph:

I put them in almost everything I write, so that would be convenient. But yeah, I just think that democracies work like this. There's going to be mistakes made and there's going to be embarrassing decisions made, but that's what democracy is. We're supposed to scrutinize them, we're supposed to challenge them, we're supposed to endorse them. It's just the way it works. So, I think it's better to put more information out there now than ever before.

Ron Kruzeniski:

Well, Trish, I am going to thank you very much. Sorry it took so long to do this podcast, but your submission triggered it and made it a really good time to talk about the changes you'd like to see. So, I want to wish you the absolute best of luck that in '24, '25, you see all those amendments come to pass.

Tricia Ralph:

I hope so. I hope for Nova Scotians, that's what happens.

Ron Kruzeniski:

So, thanks very much and we'll be talking to you on our regular Commissioner calls, which we happen every month. So, thanks again.

Tricia Ralph:

That's great. Thanks Ron.