Notes for a presentation by Dean Beeby, of the Halifax bureau of The Canadian Press/Broadcast News, to the Nova Scotia FOIPOP Advisory Committee on May 14, 2003.

Thank you for this opportunity to make a presentation to the committee about changes needed to the FOIPOP system in Nova Scotia.

The Canadian Press and Broadcast News have been frequent users of freedom-of-information laws and supporters of greater transparency in government, whether at the municipal, provincial or federal levels. Our news agencies have also been among the more prominent media users of the Nova Scotia legislation since at least 1998.

I should first note that I recently served on an advisory committee much like your own. Our eight-member group advised a federal task force reviewing the Access to Information Act and its administration. I learned a lot about the Act during the year-long process but I also found the experience terribly frustrating. In the end, I disagreed with many of the final recommendations of the task force.

Sadly, I see some of the same mistakes being made with your committee as well. Our advisory committee had only one member who was a frequent user of the legislation – myself – and only one other person, an historian, who had ever filed an Access to Information Act request. Most of the remainder of the group consisted of former civil servants, all of whom represented to one degree or another the views of government bureaucracies. Indeed, many of these people still relied for income on federal government consulting contracts. The bottom line was that the membership of the committee was constructed so as to minimize the voice of users. And of course the task force itself was run entirely by federal civil servants. The result was a report that in many respects reflected the fears and concerns of the federal bureaucracy and played down the interests of users.

I look at the membership of your own committee, and note the muted voice of users. I also note the strong voice of the civil service among your members. My experience at the federal level tells me that, if nothing else, the recommendations of this committee will almost certainly lack some credibility with the community of users because the advice will be seen to reflect the bureaucracy's views.

One of the things the federal task force did right was to review the administration of the Act as well as the actual text of the law. Laws mean little unless they're administered well, and it's meaningless to tinker with legal text if there's no intention to implement it effectively. The task force report contains a lot of sound, practical proposals for streamlining paper flow and for eliminating the culture of secrecy. Unfortunately, the mandate given your own committee has been unwisely restricted to the legislative face of freedom of information when the root problem often lies with the people and resources

dedicated to making FOIPOP work day-to-day, one application at a time. So some of the comments I make today refer to issues outside the narrow confines of the legislation in the hope you will not confine yourself to your narrow mandate.

Here, then, are a few of the things that are broken in Nova Scotia's freedom-of-information regime:

1. It's too expensive for users.

Huge fee increases in 2002 have made Nova Scotia's freedom-of-information system the most expensive in the country.

The basic application fee rose five-fold, to $25 in April 2002. And formerly free reviews of government decisions now cost $25 to initiate. Search fees are up and there's no longer two hours worth of free search time.

It's hardly surprising that the number of requests dropped by 20 per cent, and the number of requests for reviews dropped 26 per cent, compared with the same period a year earlier. At The Canadian Press/Broadcast News we have a limited budget for freedom-of-information requests and have been forced to curtail the number of applications simply because of the fee increases. We're spending the same amount of money but getting less bang for our buck.

These cutbacks are obviously happening with political parties and other media organizations as well. Statistics show a massive decline in the number of media requests in the last three quarters of 2002, immediately following the fee increases. The same precipitous drop can be charted for political parties. Yet, these two categories of users are perhaps the most important in assuring that the purposes of the Act are fulfilled. The legislation says FOIPOP is intended to "facilitate informed public participation in policy formation" and to "permit the airing and reconciliation of divergent views." More than private citizens or business users, political parties and the media are by nature committed to stirring public debate, and they have the forums to do so: newspapers, television, radio and Province House itself. So the very groups that can most effectively fulfill the stated purposes of the Act are being forced to curtail their FOIPOP activities.

The fall in the number of reviews is also worrisome. Darce Fardy, the review officer, dismisses the argument that the drop is the result of more openness among departments. Rather, it seems clear that fees are scaring requesters away.

The revenue collected from fees will never cover more than a few percentage points of the cost of processing. By my calculation, the $14,998.60 in fees collected in 2002 amounted to just 1.6 per cent of the total estimated cost of $900,000 for the FOIPOP system that year. (This tiny percentage is in line with other freedom-of-information regimes across Canada.) It is therefore grossly misleading for the provincial government

to suggest that applicants are being asked to cover any meaningful share of final costs. Rather, the real savings are realized by discouraging people from filing requests in the first place, which it seems clear was the purpose of the fee increases. And of course, fewer requests mean fewer chances for the government to be embarrassed by disclosures – another bonus for this administration.

I am particularly concerned that the fees are having an uneven impact on the various categories of requesters. Businesses and law firms no doubt welcome the higher fees. The amounts are all tax-deductible anyway (which, by the way, results in little net benefit to provincial coffers), and there will be fewer other requests clogging up the system and competing for the attention of FOIPOP administrators. They'll get better service. Ordinary citizens, on the other hand, as well as non-profit groups, are being forced out of the game. The new system of fees thus caters to the wealthy and powerful while leaving average Nova Scotians out in the cold. Surely, our legislators cannot defend this state of affairs.

Justice Minister Jamie Muir has claimed that the new fees have cleared out a "tremendous number of frivolous requests," which he has referred to as "garbage". Muir particularly condemns requests that he calls "fishing expeditions" – ironic in a province that has for so long relied on fishing as its economic mainstay.

I find these comments quite offensive, especially coming from the minister charged with responsibility for upholding FOIPOP legislation in the province. Muir has never bothered to define what he means by "frivolous" or by "fishing expeditions". Might those terms refer to anything that is distasteful, awkward or inconvenient for the government? If so, most of my own requests definitely qualify.

If massive fee increases were, in fact, intended to screen out so-called frivolous or vexatious requests, the government has used a sledgehammer to kill a gnat. The current FOIPOP review officer, Darce Fardy, has recommended that public bodies be allowed to refuse to process frivolous and vexatious applications. I endorse this recommendation on two conditions, i.e., that most fees be reduced to their previous levels and that the review officer be the final arbiter in determining what constitutes a frivolous or vexatious request.

I also think the application fee should be dropped altogether. Neither Britain nor the United States charges its citizens simply to ask for information. I believe freedom of information is a basic democratic right of citizens, just as is the right to vote. We don't charge citizens to cast a ballot in elections, which are much more expensive to run than the freedom-of-information system, and we should not charge them merely to ask for information about how they are being governed. All fees should be reduced for non-commercial users, especially those committed to ensuring any information released is made available without charge to wide audiences. And users should not be charged when departments need time to search for improperly indexed and poorly filed records.

2. The administration of the Act is amateurish and poorly funded.

A few years ago, I made a FOIPOP request to Transportation and Public Works for records pertaining to the department's decision to limit the number of roadside crosses that Mothers Against Drunk Driving could place along Nova Scotia's highways. I was appalled to discover that the person administering my request, Chris Welner, was also the chief media-relations officer for the department. As I sat in a departmental office reviewing the released documents, Mr. Welner buzzed about assuring me there was no controversy worth writing a story about.

On another occasion, I requested material from Economic Development about some monetary incentives offered to call centres. The woman processing my requests was simply overwhelmed by task and confessed that she only worked in the department two days a week. Fulfilling those requests ultimately took 18 months, and I have a complaint under way about the some major exemptions applied to the material.

On the other hand, a few departments – such as the Health Department – are quite professional in the way they administer the legislation.

The point is, there is a wildly uneven standard of service among government departments and agencies. In the Nova Scotia system, the Justice Department is considered the lead agency in FOIPOP but has provided little direction or training to public bodies and departments. Assigning a staff member to the post of FOIPOP administrator is often a bureaucratic afterthought, loaded onto civil servants who may already be overworked.

At the very least, the job of FOIPOP administrator should not be given to anyone who also has responsibility for making the department look good. This is an obvious conflict of interest. And anyone who is made an administrator should be given thorough training. Too often, administrators must learn on the job, on the applicant's dime. Departments should also be given resources commensurate to the number of applications coming through the door. Ideally, there will be a central pool of administrators who can be deployed to those departments facing an application crunch. And decision-making power should be delegated to administrators to end delays caused by lengthy consultations that have to be made with senior executives and the minister. Such delegation will help remove petty politics from decision-making.

Statistics on the system seem to be put together in an ad hoc basis. Without detailed, reliable and regular statistics, problems can remain masked for years. The province should routinely provide information to the public about how well or how poorly the system is being administered, and should set targets for improvement each year. Each department should be required to report publicly each year on how well it has performed its duties under FOIPOP.

Training in freedom of information should be provided to every existing civil servant. And the orientation process for every newly hired civil servant should make clear that FOIPOP is an integral part of the job, whether or not he or she is appointed to be an administrator. The premier and cabinet ministers should all take a leadership role, stately

publicly that the government and each department is committed to making FOIPOP work and that civil servant should not fear for their jobs simply because they try to live up to the spirit of the Act.

3. The review officer doesn't have enough power and resources.

Darce Fardy is a hard-working and thoughtful review officer, committed to promoting freedom of information and making it work well. The province is lucky to have found such an able individual to fill this difficult post. I praise Mr. Fardy even though he often rules against me whenever I complain to his office about the response of a government department to my FOIPOP requests. Even when I lose, I always learn something useful from his articulate, insightful and thorough reports. The mediation process that has recently been emphasized within his office has been useful and effective as well.

Mr. Fardy accomplishes all this on an annual budget of just $212,000 (2002) and a total of three staff members. It is a remarkable achievement for such a modest amount of money. But even with his resourcefulness, Mr. Fardy still needs help. For one, the province should end the bizarre situation in which Nova Scotia's information ombudsman is the only one in Canada who is not an officer of the legislature. The government has also displayed a signal lack of courtesy for keeping Mr. Fardy in the dark about major proposals affecting his work. For example, he was not alerted to proposed fee increases, to the creation of a routine-disclosure committee, even to the striking of your very own advisory committee. Mr. Fardy is a knowledgeable resource who would help to improve FOIPOP policy development. He should be accorded more respect.

I am also concerned that Mr. Fardy has no order-making powers under the Act. Statistics for 2002 show that public bodies completely rejected his recommendations in about 29 per cent of the cases he investigated, while his recommendations were partially rejected in 14 per cent of the cases. Those are disturbing numbers and I understand rejections have been on the rise over the last few years. I suspect departments have become emboldened, knowing there is no stick to hit them with other than court action, which few requestors can afford to undertake. At the federal level, the Information Commissioner of Canada – who also has no order-making powers – nevertheless has staff lawyers and a legal fund which he can draw upon to take precedent-setting cases to court. I believe Nova Scotia's review officer should have similar resources to be able to fight for ordinary Nova Scotians who do not have the money to challenge government decisions.

Freedom of information can be a messy, difficult and often embarrassing process for elected parties. But after more than 20 years of experience in Canada, governments have somehow survived the greater transparency imposed by FOI laws. Indeed, I would say that our democratic institutions have been strengthened, and taxpayers' money has been better safeguarded, because of this kind of legislation. Civil servants and ministers now think twice before wasting public money knowing that a paper trail may eventually expose them. Many departments are proactive in releasing negative information knowing

that the documents will inevitably become public anyway. Exposure of past misspending has forced more public servants to tighten policies and procedures. Embarrassing headlines often lead to long-term improvements in public policy and public administration. Nova Scotia was a pioneer in implementing freedom of information, passing the country's first such law in 1977. Recent fee increases and shoddy FOIPOP administration has tarnished the province's image, making it seem like a backwater of patronage and old boys who want to draw a veil over government operations. If citizens are to have faith and confidence in their governments, they need to know that their leaders are committed to transparency. The Nova Scotia government must undo the damage higher fees and misadministration have done to public confidence or be prepared to answer to the electorate.