Response from : **Heavy Civil Association of Newfoundland and Labrador**

Re: Section 39 Roundtable Correspondence from Committee Chair dated February 9, 2021 (the "Feb 9 Letter")

VIA E-MAIL

Access to Information and
Protection of Privacy Act
Statutory Review Committee 2020
5th Floor, Suite 502
Beothuck Building
20 Crosbie Place
St. John's, NL A1B 3Y8
Attn: The Honourable David B. Orsborn, Committee Chair
admin@nlatippareview.ca

February 19, 2021

Dear Mr. Chair:

Re: Section 39 Roundtable Correspondence from Committee Chair dated February 9, 2021 (the "Feb 9 Letter")

We write to provide a response to the questions you posed, based on a revised section 39 of the *Access to Information and Protection of Privacy Act, 2015*, SNL 2015, c A-1.2 (the "**Act**"), in the Feb 9 Letter. We will address the questions in the order they appeared in the Feb 9 Letter. The hypothetical section 39 contained in the Feb 9 Letter will be referred to as the "revised section 39."

Should Disclosure be Granted in the Assumed Circumstances: The Confidentiality Requirement

The Heavy Civil Association of Newfoundland and Labrador (the "**Association**") believes disclosure should be refused in the circumstances outlined in the Feb 9 Letter.

If a third party has proven that records subject to disclosure are either (a) a trade secret or (b) information causing the types of harm outlined in the revised section 39(1)(b), the Association believes that alone is enough cause to withhold the record. There should not be a stand-alone confidentiality requirement. Whether records were supplied to the public body in confidence does not add significant value in determining whether the information is such that a third party could be harmed by its disclosure to the public (including if the potential third-party harm is being weighed against any public interest override).

The types of information described in the revised sections 39(1)(a) and (b) are inherently confidential in nature. A trade secret is just that, a secret held by the third party. Information that, if disclosed, would result in financial loss to a third party or harm a third party's competitive position is intrinsically information that such third party would treat confidentiality. If the test for either revised section 39(1)(a) or (b) is met, the question as to whether the information is in fact confidential has already been answered– there is no need for a separate part of the test in that regard.

The Association submits that the revised section 39(1)(b)(v) is a more relevant, realistic, and commercially reasonable reference to confidentiality in respect of third party information. The current stand-alone test for confidentiality is burdensome and often difficult to make out. Although the wording requires the information to have been provided "implicitly or explicitly in confidence", interpretation of the provision has gone far beyond that wording and requires information to explicitly be provided in confidence. The Association submits that the wording in revised section 39(1)(b)(v) achieves the proper goal of protecting third party information by asking if, in fact, at the time of disclosure, the information would cause the third party a loss of confidentiality. That test is significantly more relevant than whether the third party marked "confidential, subject to section 39 of the Act" next to the confidential information it submits – a part of the current test according to the Office of the Information and Privacy Commissioner's (the "**OPIC**") interpretation of section 39(1)(b) and section 8(2) of the *Public Procurement Regulations* (Newfoundland and Labrador). That requirement of the test can be irrelevant in determining if, in fact, the third party considers the information to be confidential in nature at the time of its potential disclosure.

<u>A Public Interest Override</u>

The Association understands the rationale supporting a public interest override – the Act is public interest legislation. If there was to be a limiting factor on the protection of third-party interests under the Act, it makes sense that it would be the legitimate interest of the public. The Act already contains a broad public interest exception applicable to most exceptions to disclosure at section 9.

However, as drafted in the revised section 39(4), the Association has concerns about the vagueness of the wording and how it may be interpreted. "[T]he public interest in disclosure clearly outweighs in importance any harm to the… third party" leaves a lot of room for interpretation on what constitutes "public interest" and "clearly outweighs in importance." The Association's concern is that without more specific or limiting language, public bodies could rely on this override to justify disclosure of any information that members of the public would like to know – even if it is not truly in the "public interest" in the broader and more significant sense.

For example, factors that the OIPC have deemed relevant to consideration of the public interest override in section 9 are broad and over inclusive. The following factors are listed as relevant in the OIPC's guideline in respect of the public interest override:

> *2. Public interest in the issue – for example, if a policy decision has a widespread or significant impact on the public, or if there is public interest in informing the debate on the issue (recognizing that there is still a need for a safe space in which to formulate and develop policy as contemplated by the advice and recommendations exception). Also note that "There is a wide difference between what is interesting to the public and what it is in the public interest to make known."…*

… 4. Suspicion of wrongdoing by public body – Disclosure must serve the wider public interest rather
than the private interests of the applicant and the suspicion must be more than a mere allegation. There must be a plausible basis for the suspicion. This can be assessed by considering whether one or more of the following are applicable:

(a) facts suggest the basis of the actions are unclear or open to question;
(b) there has been an independent investigation;
(c) the content of the information may refute the suspicion or may be a 'smoking gun', both of which favour disclosure;
(d) evidence of public concern regarding the issue;
(e) there is a public interest in disproving suspicions in that release would restore confidence in the public body. Note - the Office of the Information and Privacy Commissioner (OIPC) cannot assess wrongdoing, it can only assess whether there is public interest in releasing the information.

5. Presenting a full picture – to aid the public in fully understanding the reasons for a public body's
decisions, to remove any suspicion of misrepresentation or misinformation. Present the full picture and let people reach their own view. Also, if the information that underpinned the decision was limited or if information that is already public is misleading, there is value in the public knowing that. Public bodies should be careful not to choose to only release information which is favorable to them, as this would amount to a misuse of the override.

Each of the above factors raises concern due to a lack of limiting language and potential for broad interpretation.

Construction and infrastructure projects, particularly large-scale ones, often contribute to public debate in the Province. The Association submits that wide-spread debate regarding an issue by itself does not necessarily create a public interest in disclosure of information related to the issue, unless the debate itself is in respect of a legitimate lack of transparency. Even in that instance, disclosure should relate specifically to the information being requested by or necessary to properly inform the public debate.

Number 4 of the above factors suggests that suspicion of wrongdoing may be met if "evidence of public concern regarding the issue" is the sole applicable factor. Again, public concern regarding an issue in and of itself does not, in the Association's view, create a valid "public interest" in disclosure of documentation relating to that issue.

The Association submits that any public interest override added to section 39 of the Act should contain more specific wording or limiting factors than what is presently in the revised section 39(4).

For example, New Brunswick's *Right to Information and Protection of Privacy Act*, SNB 2009, c R-10.6 contains a public interest override for third party records with specific language as to what should be considered:

22(4)Subject to section 34 and any other exception provided for in this Act, the head of a public body may disclose a record that contains information described in subsection (1) or (2) if, in the opinion of the head, the private interest of the third party in non-disclosure is clearly outweighed by the public interest in disclosure for the purposes of

(a) improved competition, or
(b) government regulation of undesirable trade practices.

Further, Ontario's *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31's public interest override is only applicable to records that reveal significant risks to the public:

> *11 (1) Despite any other provision of this Act, a head shall, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public.*

The Association values the opportunity to engage collaboratively on the issues. Should the Chair have any questions in regard to this response, or any other issues he would like the Association's input on, please do not hesitate to reach out.

Yours very truly,

Jim Organ
Executive Director
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