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19 March 2021

The Honourable David B. Orsborn:

I am writing to respond to your letter of 9 February 2021 which was sent as follow-up to hearings for Newfoundland and Labrador's Access to Information and Protection of Privacy Act (ATIPPA) 2020 Statutory Review. We thank you for the kind invitation to the Centre for Law and Democracy (CLD) to participate in the hearings, which we were honoured to do, and for the chance to make additional submissions in response to your letter.

In your letter, you posed a proposed revised version of s. 39 of ATIPPA, the exception to the duty to disclose for trade secrets and commercially sensitive information, hypothetically amended to change the standalone confidentiality requirement into a harm test and to add in a public interest override. You then proceeded to ask two questions, based on two assumptions, namely that the Office of the Information and Privacy Commissioner (OIPC) was satisfied that disclosure of hypothetical requested information would result in the harms envisioned and that the public interest override was not applicable.

The first question was whether disclosure of the information should be granted or refused. We assume, from the assumptions, that the matter is before OIPC for this purpose (and that the public body has refused disclosure). The short answer to this question is that, based on the amended provision, disclosure should be refused.

However, we also want to comment here on the first change you have proposed for s. 39, which effectively changes confidentiality from an additional barrier to secrecy to an additional (harm-tested) ground for secrecy (in other words, reverses its role vis-à-vis secrecy). CLD both supports the original formulation of confidentiality in s. 39 as a barrier to secrecy and is strongly opposed to the new formulation of it as an additional ground for secrecy.

In terms of retaining the original formulation, CLD believes that a confidentiality requirement has value as an additional procedural safeguard against public officials' tendency to treat information in an overly sensitive manner. The fact is that the balance of power in access to information systems is tilted towards public officials, and global experience, as well as experience in Canada, shows that they tend to err on the side against disclosure. CLD's recommendation is therefore to build as many safeguards into the legislation as possible to redress that imbalance. One such safeguard would be to require information to have been provided in confidence, in addition to proving harm and that the public interest does not favour disclosure. This safeguard also makes intuitive sense. If even the original supplier of the information did not do so in confidence, suggesting his or her indifference to others viewing the information, the official should be equally equitable to its release. It may also be noted that inasmuch as this is an essentially objective test (albeit not entirely since it also covers implicit provision in confidence), it introduces clarity and predictability into the system, thereby reducing disputes, including costly appeals to the OIPC and potentially even the courts, which is always a virtue in an administrative system.

It is true that third parties may sometimes provide information that is commercially sensitive or that later turns out to be commercially sensitive without indicating at the time that they are doing so in confidence. We believe that these situations are very rare, with the opposite (information that is not sensitive being stamped as confidential) being far more common. And the implicit confidentiality rule may go some way to redressing any risk of this. We therefore recommend that the current formulation of the "supplied in confidence" be retained.

In terms of the new formulation which relies on "loss of any confidentiality" as an additional form of harm that would justify non-disclosure, we do not believe this is warranted. We note that it is not found in other legislation and yet this has never been considered to be a problem. Put differently, the exception as it is, along with other exceptions, provide sufficient protection for secrecy interests. In other words, the law should not allow a breach of third party confidentiality alone to constitute a harm which would trigger the exception. The main harm that could conceivably result from this would be to relations between the third party and the government, due to the latter refusing to respect the former's confidence. However, third parties are on clear notice that they do business with government under the condition that their information might be released through an objective application of the RTI law, albeit subject to protecting their legitimate commercial interests. As such, any risk of damaged relations is effectively negated.

CLD also notes that subjecting a "loss of confidentiality" exception to a harm test would probably be ineffective in practice, as officials would likely default to assuming harm whenever a third party document had been stamped confidential. This would, then, effectively give third parties a veto over disclosure simply by claiming that any information was confidential. We therefore strongly that even if the current formulation is removed from the law, that the new formulation not be added.

Your second question was whether it should be made explicit that OIPC could apply a public interest override in relation to s. 39. Your proposed amendment here would grant the head of a public body the discretion to release information in the public interest, even though this is a

mandatory ("shall refuse") exception which are currently excluded from the public interest override provided in s. 9 of the Act.

CLD welcomes any extension of the public interest override, which international law stipulates should apply to all exceptions. However, casting this as a discretionary override probably cannot be justified as a matter of principle and likely robs it of much of its potential benefit in practice. As a matter of principle, if the public interest demands disclosure, public officials should not have the discretion to withhold the information. As a matter of practice, government tendencies towards secrecy mean that public officials will almost inevitably exercise their discretion to decline disclosure. As OIPC indicated during the 28 January 2021 hearing, even the s. 9 mandatory override has never been successfully used in the past five years. A discretionary override would be even less likely to be used. We therefore strongly recommend that the override be cast in mandatory language, just as the existing override in s. 9 is.

The overwhelming experience globally is that even where overrides are mandatory they tend to applied only at the appeal stage of the access to information procedure (i.e. far less often directly by public bodies). Adding in an explicit reference to the power of OIPC to apply this override would certainly help here, although it is possible that the current language of s. 47 is already broad enough to cover this. However, in this case the legal framework would need to make it clear that OIPC's application of the override, even if applied on a discretionary basis, was itself applicable in the same way as any other OIPC "recommendation". As such, language in provisions like ss. 50(2) and 60 would need to be amended to embrace this (since they are currently worded to reflect the s. 9 override and would not apply to this one).

Our main recommendation here, however, as pointed out in our November 2020 Submission, is to amend s. 9 so that it applies to all exceptions, including mandatory ones, including s. 39 (which would also necessitate the removal of the discretionary override in s. 27). This would be an elegant drafting solution which would avoid the need to revise other provisions in the law, as noted above (and also avoid the need for any specific reference to the OIPC role vis-à-vis the proposed stand-alone s. 39 public interest override). It would also align the Newfoundland law with international standards. The experience of other countries which have general overrides clearly demonstrates that this does not create a risk of harm but, rather, helps access to information laws deliver their full benefits.

Yours sincerely,

Toby Mendel
Executive Director