



House of Assembly
Newfoundland and Labrador
Commissioner for Legislative Standards

39 Hallett Crescent, St. John's NL A1B 4C4
Telephone: (709) 729-0714 Facsimile: (709) 729-0679 Email: brucechaulk@gov.nl.ca

RECEIVED

NOV 27 2020

November 27, 2020

Access to Information and Protection of Privacy Statutory Review 2020
3rd Floor, Beothuck Building
20 Crosbie Place
St. John's, NL
A1B 3Y8

Attention: The Honourable David B. Orsborn – Committee Chair

As the independent statutory office that has the exclusive jurisdiction to conduct investigations into the conduct of our elected officials, the Office of the Commissioner of Legislative Standards often is in possession of records of a very personal and private nature. The number of complaints by members of the House of Assembly into the conduct of other members has risen sharply over the past several years. As a result of this increase, the Commissioner has been busy in conducting investigations and providing reports to the House of Assembly, as it is the House of Assembly that is ultimately responsible for the discipline of members.

The fundamental issue from the Commissioner's perspective with respect to the *Access to Information and Protection of Privacy Act, 2015 S.N.L. 2015 c. A-1.2* ("ATIPPA"), is the interaction between s.33 of the ATIPPA with s.41(c) of the ATIPPA, and more importantly, parliamentary privilege.

Legislative Overview

House of Assembly Accountability, Integrity and Administration Act

The *House of Assembly Accountability, Integrity and Administration Act, S.N.L. 2007 c. H-10.1*, arose out of the House of Assembly spending scandal, and the subsequent report of Justice Derek Green entitled, "Rebuilding Confidence". In his Report, Green J. recommended a Code of Conduct be developed to govern the conduct of members of the House of Assembly and stated:

A Code of Conduct – The House should initiate the development of a code of conduct for Members by referring the matter either to the Standing Committee on Privileges and Elections or to a committee of the House specially constituted for the purpose. Such a code to govern the conduct of Members should ultimately be adopted by resolution of the House. **This concept should include**

the appointment of a Commissioner for Legislative Standards with responsibility for investigating and conducting an inquiry, when necessary, to determine whether a Member has failed to fulfill any obligation under the code. The Commissioner would then report to the House with recommendations, including sanctions where appropriate. A code of conduct should be promulgated for House staff as well as MHAs. Generally, the standards expected of House staff should be reflective of sound ethical standards and be as close as possible to the standards applicable generally in the public service. [Emphasis Added]

Subsequently, under the authority of s.35 of the Act, the Code of Conduct was adopted. Section 35 of the Act reads as follows:

35. (1) The speaker shall, immediately after the coming into force of this Act, refer to the standing committee of the House of Assembly on Privileges and Elections the responsibility of developing and proposing to the House of Assembly the adoption, by resolution, of a code of conduct for members to assist members in the discharge of their obligations to the House of Assembly, their constituents and the public at large that

(a) provides guidance on the standards of conduct expected of members in discharging their legislative and public duties; and

(b) provides the openness and accountability necessary to reinforce public confidence in the manner in which members perform those duties.

(2) The code of conduct adopted under subsection (1) shall be

(a) treated as a standard against which the actions of a member may be judged for the purpose of censure by the House of Assembly and by the public; and

(b) in addition to other standards of duty and responsibility imposed on members by this Act and any other law.

(3) The commission shall, within 90 days of the coming into force of this Act, develop and adopt a code of conduct applicable to the officers and other persons employed in the House of Assembly service and in the statutory offices.

(4) Before February 1 in a year, a member shall file with the clerk a declaration reaffirming the member's commitment to follow the code of conduct for members.

By operation of s.36(1) of the Act, a member may request an opinion from the Commissioner with respect to the compliance of another member with the Code of Conduct. This section reads as follows:

36. (1) A member who has reasonable grounds to believe that another member is in contravention of the code of conduct adopted under subsection 35 (1) may, by application in writing setting out the grounds for the belief and the nature of the alleged contravention, request that the commissioner give an opinion respecting the compliance of the other member with the provisions of the code of conduct.

Upon completion of an inquiry, the Commissioner shall report his or her opinion to the management commission which then shall present the Commissioner's opinion to the House of Assembly. Section 38(1) states:

38. (1) Where a request for an opinion is made under subsection 36 (1) or (3), or where the commissioner conducts an inquiry under subsection 36 (2), he or she shall report his or her opinion to the commission which shall present the report to the House of Assembly within 15 sitting days of receiving it if it is in session or, if not, within 15 sitting days of the beginning of the next session. [Emphasis Added]

In providing his opinion, the Commissioner may recommend the penalties outlined in s.39. Section 39 states:

39. Where the commissioner determines that a member has failed to fulfil an obligation under the code of conduct, he or she may recommend in the report under section 38

- (a) that the member be reprimanded;
- (b) that the member make restitution or pay compensation;
- (c) that the member be suspended from the House of Assembly, with or without pay, for a period specified in the report; or
- (d) that the member's seat be declared vacant.

The recommendations provided by the Commissioner are then addressed by the House of Assembly. Section 40 states:

40. (1) A recommendation in a report of the commissioner shall not take effect unless the report is sent to the commission under subsection 38 (1) and concurred in by resolution of the House of Assembly.

(2) A report tabled in the House of Assembly under subsection 38 (1) shall be taken up and disposed of within 15 sitting days after the day on which it was tabled or within a longer period, not to exceed 6 months, that the House of Assembly may determine.

Access to Information and Protection of Privacy Act, 2015 S.N.L. 2015 c. A-1.2

Section 2(x)(v) of the ATIPPA defines a public body as “the House of Assembly and statutory offices, as defined in the House of Assembly Accountability, Integrity and Administration Act”.

Section 2 (r) of the *House of Assembly Accountability, Integrity and Administration Act*, 2007 S.N.L. c. H-10.1 defines statutory office as:

- (r) "statutory office" means the office and administrative staff directly serving the
- (i) Chief Electoral Officer,
 - (ii) **Commissioner for Legislative Standards,**
 - (iii) Child and Youth Advocate,
 - (iv) Information and Privacy Commissioner,
 - (v) Citizens' Representative,
 - (v.1) Seniors' Advocate, and
 - (vi) other offices of the House of Assembly, with the exception of the office of the Auditor General, that may be established under an Act; and

Section 41 of the ATIPPA is a mandatory exception to access to information entitled, “Disclosure of House of Assembly service and statutory office records” and states:

41. The Speaker of the House of Assembly, the officer responsible for a statutory office, or the head of a public body shall refuse to disclose to an applicant information

(a) where its non-disclosure is required for the purpose of avoiding an infringement of the privileges of the House of Assembly or a member of the House of Assembly;

(b) that is advice or a recommendation given to the Speaker or the Clerk of the House of Assembly or the House of Assembly Management Commission that is not required by law to be disclosed or placed in the minutes of the House of Assembly Management Commission; or

(c) in the case of a statutory office as defined in the *House of Assembly Accountability, Integrity and Administration Act*, records connected with the investigatory functions of the statutory office. (emphasis added).

Over the last several years the Commissioner for Legislative Standards has performed numerous investigations pursuant to s.36 (1) of the *House of Assembly Accountability, Integrity and Administration Act* into the conduct of members. However, despite the mandatory exception to access that exists in s.41(c), a member has attempted to use s.33 of the ATIPPA to obtain access to the Commissioner's investigative file. This creates several problems for the Commissioner. First, s.41(c) is a mandatory prohibition of access and it does not authorize the disclose of records in the context of a s.33 investigation. Secondly, members of the House of Assembly are not employees and therefore s.33 should not apply to a code of conduct investigation, and thirdly, as the Commissioner is a statutory delegate of the House of Assembly, absent clear and compelling statutory language that abrogates parliamentary privilege,, the Commissioner should not be compelled to provide records associated with or connected to a code of conduct investigation to an access to information applicant.

While many of the issues highlighted above were argued in Dale Kirby v. Bruce Chaulk 2019 01G 1380, a decision has yet to be provided. Regardless of the decision, statutory amendments would solve any uncertainty regarding s.41 (c).

It is noteworthy that the Auditor General of the Province is excluded from the definition of a public body in s. 2(r)(vi) in the list of statutory offices set out in s.2(r) of the *House of Assembly Accountability, Integrity and Administration Act* S.N.L. 2007 c. H-10.1. Given the role the Auditor General plays in holding government financially accountable, that office's exclusion from the ATIPPA helps to preserve the Auditor General's independence. The Commissioner for Legislative Standards performs a similar role in ensuring that our elected officials are held ethically accountable by avoiding conflicts of interests, declaring financial interests, and investigating members where there are reasonable grounds to conduct an inquiry into alleged misconduct. The independence of the Commissioner's office should not be impacted by access to information applicants seeking information contained within the Commissioner's file. Therefore, the removal

of the Commissioner for Legislative Standards from s.2(r) would be a relatively simple legislative amendment that would take it outside the ATIPPA. This amendment would also serve a dual purpose, as it would also ensure that there are no issues with conflict between the ATIPPA and parliamentary privilege.

However, in the event the Committee decides not to remove the Commissioner for Legislative Standards from the ATIPPA, an amendment to s.41 (c) is still necessary to prevent an intrusion into the investigatory file. Therefore the Commissioner recommends that s.41(c) be amended as follows: that

The Speaker of the House of Assembly, the officer responsible for a statutory office, or the head of a public body, **notwithstanding s.33**, shall refuse to disclose to an applicant information in the case of a statutory office as defined in the *House of Assembly Accountability, Integrity and Administration Act*, records or reports connected with the investigatory functions of the statutory office.

If you would like to discuss these issues further or require additional information please feel free to contact the undersigned at (709) 729-6068.

Best regards,



Bruce Chaulk
Commissioner for Legislative Standards