December 2, 2020

Access to Information and Protection of Privacy Statutory Review 2020
3rd Floor, Beothuck Building
20 Crosbie Place
St. John's, NL
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Attention: Review Committee Chair David B. Orsborn

RE: Statutory Review Process

I am writing to provide comments and suggestions to the statutory five-year review of the *Access to Information and Protection of Privacy Act, 2015* (the "Act"). I appreciate the ability to submit these points somewhat later than the deadline set for public comment.

My experience with the Act has extended both during my time with the Department of Justice and Public Safety, including as Deputy Minister and Deputy Attorney General, as well as in private practice. Through that experience there were various points respecting the Act which I had noted should be highlighted to the next review process. As a result of being compiled over a period time, my comments do not have an overriding theme; instead I have organized them in the order they arise in the Act.

Paragraphs 5(1)(k)(l) and (m)

These provisions provide protection against disclosure to records "relating to an investigation" of the Royal Newfoundland Constabulary. As a public body under the Act, the provisions logically apply to the RNC. However, by being specific to the RNC, the effect is that the Act does not provide the same protection to similar materials relating to an investigation by any other law enforcement agency, most particularly the Royal Canadian Mounted Police. While such information in the hands of the RCMP is governed by federal access to information laws, information "relating to an investigation" by the RCMP in the possession of the provincial government or a provincial public body would be governed by the provisions of the Act. There is protection against a requirement to disclose such information under subsection 31(1), but this is a discretionary provision. I note the Office of the Information and Privacy Commissioner, on page 17 of its submission to the Review Committee, characterized these provisions as meaning "the Act does not apply to law enforcement records where the investigation has not been completed." My concern is that the actual language of the provisions is not this broad,

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and I would suggest the paragraphs of section 5 should be reviewed as to whether the exemptions they provide should include reference to criminal law enforcement generally, or at least the RCMP specifically, for consistency in the treatment of records relating to an investigation generally under the Act.

Section 19

The interaction of subsections (2) and (6) of this section combined with section 16 can cause confusion. While subsection (2) states that providing notice to a third party under this section does not suspend the time for a reply under section 16(1), it also does not clearly specify that the reply which is required to be provided under subsection (6) will satisfy the obligations under section 16. The result is some ambiguity as to how the timing and notice provisions align.

Subsections (5), (6) and (7) are also somewhat inconsistent. In subsections (5) and (6) the head of the public body is required to advise the applicant and the public body that access will be granted at the end of 15 days unless the third party exercises one of the avenues available to challenge the decision. However, subsection (7), which authorizes disclosure has no reference to 15 days, but instead provides disclosure can only occur upon receiving confirmation as to whether the third party has exhausted possible resources or decided not to file. This puts the head of the public body in the position potentially of having to confirm a negative, and creates a process that can take days to confirm, resulting in disclosure which does not happen within the 15 days prescribed by subsections (5) and (6). It is suggested a more consistent approach would be a requirement on a third party to provide the head of the public body either with notice of a court action under section 53, or copying them on a complaint under section 42 (both of which are practically likely to occur in any event), and specifying the head has the authority to release the records at the end of the 15 days if not in receipt of either. This would remove the onus from the head to determine if the third party is pursuing a remedy.

Finally, there is a procedural aspect of section 19 which is not unique to the Act, but which I have seen cause concern in the business community. Section 19 is tied to section 39 (as well as section 40) which sets out the tests for the protection of third-party business information. Section 19 requires notice to be provided to third parties on the potential release of information they have provided to a public body, where the public body intends to release information it "has reason to believe contains information that might be" exempt from disclosure under sections 39 or 40. If the public body determines on its own that there is no "reason to believe" the records qualify under section 39 or 40, no notice is provided to the third party who supplied the information and the records of that third party will be released, without the third party having any knowledge or receiving any notification that such release has occurred. The concern is that this assessment with respect to whether there is a "reason to believe" records that are planned to be disclosed may fall under sections 39 or 40 is carried out by the public body in isolation, without input from the third party who supplied the information. With respect to the application of section 39, this raises the obvious issue of the competency of the public body to determine what information supplied by a business might meet the tests in section 39, including whether release may reasonably be expected to be harmful to the interests of that business if released. It presumes and requires a level of expertise and familiarity of a public body with the business and business environment of the

third party which submitted the information. Understandably the release of their information without notice can be a surprise to business third parties, who may have expected the ability to at least argue the case with the public body as to the classification of its information under section 39.

Section 20

The practice of many public bodies has been to post the responses to access requests on a public website a short time after the response has been sent to the applicant (for example see https://atipp-search.gov.nl.ca/). It has to be noted that there is no authority under the Act for such action. While section 20 provides the authority and structure for the provision of requested information to the applicant, it does not create authority for the subsequent provision of the information in question to any other party other than the applicant, or for the publication of such responses.

This may not be an issue for information which a public body has the discretion to freely disclose on its own initiative. However, a public body may have constraints on its ability to release certain information, either pursuant to legislation or pursuant to contractual arrangements and commitments (such as non-disclosure agreements with third parties). Any such restrictions will always be overruled by disclosure requirements or decisions under the Act. However, if the Act does not permit or authorize subsequent publication of such information to the public, subsequent publication is by definition not required by the Act. Such actions are instead best characterized as a voluntary disclosure of the public body. Such voluntary disclosure could be contrary to any restrictions on the public body against such activity (in fact, the restrictions would ordinarily be directed at preventing such voluntary disclosure). The result is the possibility of creating exposure of the public body to liability. While section 114 of the Act provides a protection against liability for public bodies and their officials and employees, it is only in respect of actions under “this Act”. If publicly posting responses is not contemplated by the Act, there is an argument that such actions are not protected by section 114, and liability could accrue to a public body or individuals associated with the public body if the release is contrary to legislative or contractual restrictions.

Assuming that the posting of access request responses is to be a continued practice by public bodies, it is suggested thought be given to provide express authority for same in the legislation, to provide protection to public bodies and their officials and employees in the process.

Section 33

In the process of compiling these comments I asked other lawyers if they had any issues which they believe should be raised to the Review Committee, and universally they raised section 33 as being a significant concern. I note the Office of the Information and Privacy Commissioner, in its submission to the Review Committee, has discussed section 33 extensively. The concerns raised to me were the following, which I include to ensure they are part of the material before you in your review:

- Arguably, the practical effect of section 33 of the Act as it is currently drafted is to create a two-tiered system for the protection of public sector employees and private sector

employees in harassment investigations. Private sector employees who file a harassment complaint are afforded greater confidentiality and protection in relation to workplace harassment investigations than are public sector workers. If the purpose and intent of the Act is to create transparency within public bodies, it is suggested that a structure should be found to attain that purpose without requiring public sector employees who file a harassment complaint to sacrifice privacy rights they may have under the Act sections 40 and 37.

- With respect to the OIPC's submission, recommendation 2.2 is that consideration be given to amending section 33 to "limit disclosure of records relating to a workplace investigation such that the right of access would commence after a workplace investigation has been completed, before any resulting discipline is imposed or corrective action is taken." A restriction against access applications until the completion or discontinuance of an investigation is a needed and would be a welcomed change. However, with all respect to the OPIC, the latter part of this recommendation raises concerns. The suggestion appears to be that the access to information process under the Act would become subsumed into the substantive employment law process of a harassment investigation and any possible disciplinary response. By the conclusion of the investigation, access by the parties to the investigation will not, or at least, should not, impact a determination of discipline by the employer. If there are issues with respect to the conduct of a harassment investigation, the information provided to the respondent, or a resulting disciplinary decision, the respondent has existing means to protect their rights to due process and natural justice. The OIPC's recommendation begs the question as to what the purpose of a delay would be, as the access process would not be expected to result in any change or amendment to the investigators findings after the fact. The requirement for such a procedural delay (which could be up to 30 days) could also diminish the credibility of the investigation process and the employer's ability to promptly respond to any findings. It is suggested public sector employers should be in the same position as private sector employers in their ability to effect discipline where harassment has been found to have occurred as a result of an investigation.

Section 39

Section 39 provides for the protection against disclosure of business information of a third party which meets its tests. This has always been one of the more controversial provisions of the Act; disputes respecting the interpretation and application of this section have been the source of number of complaints (a quick search finds 55 reported decisions since 2015). There will always be issues with this section, as it represents the intersection of two legitimate but inconsistent approaches to the confidentiality of information. The public sector approach, expressed through the Act and otherwise, is that all information is publicly available absent a specific reason for it to be withheld. The business approach treats all information as confidential by default unless there is a compelling business or legal requirement to disclose. This is particularly true for privately held companies (including most small businesses), not subject to the disclosure requirements of publicly traded companies.

In my view part of the problem is that the single test under section 39 applies to a broad range of information and circumstances. A public body has multiple means through which it can come into possession of third-party business information. Such information may be disclosed

through prescribed processes, such as inspections, applications, evaluations and other actions by a public body acting in a regulatory capacity. However, a public body can also come into possession of third-party commercial information through actions more akin to a commercial party, such as resource development negotiations or detailed due diligence activity for industry development investments by government. In the middle of the spectrum may be activities such as the receipt and negotiation of RFP terms and other contracting activities. The application of a single test under section 39 to information in all of these contexts is a blunt instrument.

At the risk of presenting a novel solution, my suggestion is that in addition to any consideration of re-formulating the test in section 39, consideration also be given to expand section 39 to follow the format of section 40. Section 40 deals with personal information in a highly detailed scheme. It sets out the basic premise in subsection 40(1); subsection 40(2) then lists situations where the test will be presumed not to be met; subsection 40(4) lists situations where the test will be presumed to have been met. Subsection 40(5) then sets out the test to be applied in determining any issues.

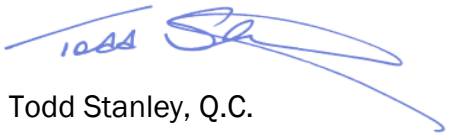
Expanding section 39 in a similar manner would provide a means to reduce uncertainty for both public bodies and third parties as to the treatment of information supplied or gathered. Lists could be prepared of types of third party information which will be presumed to be subject to release, and correspondingly of types which would be presumed not to be released; the test now contained in section 39 could be retained to apply to information not fitting into the developed lists. The lists themselves can be developed from the results of the decisions on interpretation of section 39's current test in consultation with public bodies and third parties. For example, release could be presumed for commercial information provided to public bodies in a regulatory role, provided as part of the application process for public body programs, or in respect of supply or service contracts with government (including the rates paid under those contracts). Release could be presumed to be withheld for information a public body acquires in more commercial activities such as third-party financial information acquired in due diligence processes or through negotiations of major commercial arrangements. This format would also provide a framework to create more certainty around the treatment of materials submitted under RFP, and permit a clearer indication for when notice has to be provided under section 19, as the requirement to provide notice to the third party could be linked to how the information in question is treated under an expanded section 39.

I fully acknowledge that the creation of additional provisions such as this can itself create uncertainties, as can be seen in the disputes regarding the interpretation of provisions of 40, and also that such a provision would put the Act offside relatively consistent provisions in other provinces. However, I suggest in a circumstance where (as noted by the OIPC itself in its submission) much of the dispute regarding section 39 appears to be based as much in misunderstandings as on substantive grounds, the creation of such an expanded section 39 may serve to reduce such uncertainty in a similar way as section 40 provides greater certainty in its application to personal information.

Again, I appreciate the opportunity to submit these comments slightly late and wish you all the best with the important and needed work of the statutory review of the Act.

December 2, 2020

Yours very truly,



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