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November 27, 2020

Standing Committee on Resource Stewardship
c/o Committee Clerk
3rd Floor, 9820 - 107 Street
Edmonton Alberta T5K 1E7

via: RSCommittee.Admin@assembly.ab.ca

To Whom It May Concern:

Re: Review of the Public Interest Disclosure (Whistleblower Protection) Act

I am writing on behalf of Dr. Paul Boucher, President, Alberta Medical Association.

Thank you for providing the AMA with the opportunity to comment on the latest review of the Public Interest Disclosure (Whistleblower Protection) Act.

We last commented on this legislation in 2015. At that time, we submitted numerous recommendations for improvement of the statute. Upon receiving the offer to comment for the 2020 review, we have consulted our original proposals and compared them to the current state of the legislation.

In our assessment, the great majority of changes that we proposed were not adopted following the 2015 review. We are, therefore, submitting them again; we believe them still to be relevant to the review and important to physicians within the public health care system.

Our primary concerns are with respect to:

1. The scope/definition of “wrongdoings.”
2. The characterization of “employees.”
3. The limited ability of the Commissioner to address/rectify “wrongdoings.”
4. The limited ability of the Commissioner to address/rectify “reprisals.”
5. The ability of the Commissioner to collect, use and disclose health information.
6. The discretion of the Commissioner regarding the initiation or termination of an investigation.

For your consideration, we have attached our legal counsel’s briefing note of November 17, 2020 in which our 2015 proposals are weighed against the current legislation. While it summarizes our concerns expressed in 2015, we have also attached counsel’s original analysis of that year.

We hope that these recommendations will be helpful in the committee's task ahead. If there are questions that we can answer, please advise.

Regards,

[redacted]

Shan Rupnarain, MBA
Assistant Executive Director, Public Affairs

Encl

cc: Dr. Paul Boucher, President
Mr. Mike Gormley, Executive Director

McLENNAN ROSS LLP
LEGAL COUNSEL

: Date: November 17, 2020

:

Subject: **Changes made to *Public Interest Disclosure (Whistleblower Protection) Act***

The AMA has been invited to respond to a request for input into the current Public Interest Disclosure (Whistleblower Protection) Act. In the course of your review, it has been determined that in 2015 a similar review took place, and the AMA was invited to provide input. At the request of the AMA, we prepared a memorandum which we assume formed the basis of the AMA's submission at that time.

We have been asked to determine if any of the recommendations that were put forward in the 2015 legislature review memo prepared by McLennan Ross for the benefit of the AMA's submission on review of this Act were incorporated into the *Public Interest Disclosure (Whistleblower Protection) Act*. Accordingly, we have compared the Act as it was on November 27, 2015, with the current version of the Act. It appears that several of the AMA's recommendations have made their way into the legislation.

The 6 areas of concern/recommendations which were put forward in the 2015 memo are as follows:

1. The scope/definition of "wrongdoings"
2. The characterization of "employees"
3. The limited ability of the Commissioner to address/rectify "wrongdoings"
4. The limited ability of the Commissioner to address/rectify "reprisals"
5. The ability of the Commissioner to collect, use and disclose Health Information
6. The discretion of the Commissioner regarding the initiation or termination of an investigation

1. The scope/definition of "wrongdoings"

We made the recommendation that the definition of "wrongdoings" in the act be changed so that it is more clear as to what acts or omissions constitute wrongdoings which are "substantial", create a "specific danger", or relate to a "gross mismanagement" of public assets. We suggested that definition should be revised or given certain parameters which would further clarify the scope of "wrongdoings."

We also noted that the scope of "danger to the life, health or safety of individuals" is not defined and suggested that there should be more clarity here.

It does not appear that "substantial and specific danger" or "danger to the life, health or safety of individuals" has been defined or further clarified. However, "gross mismanagement of public funds and assets" has been further clarified.

The Act now states:

Wrongdoings to which this Act applies

3(1) This Act applies in respect of the following wrongdoings in or relating to departments, public entities, offices or prescribed service providers or relating to employees:

> (c) gross mismanagement, including an act or omission that is deliberate and that shows a reckless or willful disregard for the proper management of
>
> > (i) public funds or a public asset,
> >
> > (ii) the delivery of a public service, including the management or performance of
> >
> > > (A) a contract or arrangement identified or described in the regulations, including the duties resulting from the contract or arrangement or any funds administered or provided under the contract or arrangement, and
> > >
> > > (B) the duties and powers resulting from an enactment identified or described in the regulations or any funds administered or provided as a result of the enactment,
>
> or
>
> (iii) employees, by a pattern of behaviour or conduct of a systemic nature that indicates a problem in the culture of the organization relating to bullying, harassment or intimidation;

2. The characterization of "employees"

We suggested that the use of the word "employee" is misleading, as the scope of the definition clearly encompasses independent contractors, members of ARPs and other roles undertaken by physicians. We suggested it may be simpler if the Act referred to "individual", or "person" or "affected person" to clarify that the Act applies to more than just employees.

The word "employee" is still used throughout the entire Act and still remains in section 2 of the Act which outlines the purposes of the Act. The definition of employee has changed, however. The prior 2015 definition of employee was:

(g) "employee" means an individual employed by, or an individual who has suffered a reprisal and has been terminated by, a department, a public entity or an office of the Legislature or an individual prescribed in the regulations as an employee;

The current definition of employee is:

(g) "employee" means, as the context requires,

> (i) an individual employed by a department, a public entity, an office or a prescribed service provider,
>
> (ii) an individual who has suffered a reprisal and is no longer employed by a department, a public entity, an office or a prescribed service provider, or
>
> (iii) an individual or person or an individual or person within a class of individuals or persons, prescribed in the regulations as an individual or person to be treated as an employee for the purpose of this Act or a provision of this Act;

We also suggested that the inclusion of members of a medical staff, or those with privileges may exclude certain categories of physicians, such as Residents or Medical Students.

No changes have been made the relevant sections of the regulation which specifically address medical staff and the health sector.

3. The limited ability of the Commissioner to address/rectify "wrongdoings"

We suggested that there is uncertainty in the later processes where the Commissioner is not satisfied with a reaction that has been recommended to an offending department/public entity: Specifically, we stated that "…(i)f the Commissioner is not satisfied with the reaction, then he/she makes a further report to either the Chief Officer of Executive Council, the Speaker, or to the Minister responsible for the public entity involved. It is not clear what, if anything, happens next. While it is implicit that the ultimate recipients of the Commissioner's report will do "something", it is not clear what that is, and there is no requirement that any specific action be taken."

Regarding "wrongdoings", it does not appear that the legislation has been meaningfully clarified as to what occurs after the Commissioner submits the relevant report regarding the failure of a department, public entity, office, or public service provider to appropriately follow up on the Commissioner's recommendations. There is no mention of what actions must be taken by the entities who receive the Commissioners report re failure to follow the Commissioner's recommendations. Section 22 has remained relatively unchanged – the only change made which does seem to put an obligation on the recipient of the report to do something is s 22(5)(c). S 22(5)(h) could be used to place an obligation on the recipient of the report for service providers, but it has not yet been used.

22(5) If the Commissioner believes that the department, public entity, office or public service provider has not appropriately followed up on the Commissioner's recommendations, if any, or did not co-operate in the Commissioner's investigation under this Act, the Commissioner may make a report on the matter

(c) in the case of an office of the Legislature or an office of a member of the Legislative Assembly, to the Speaker of the Legislative Assembly, and the Speaker of the Legislative Assembly must lay the report before the Legislative Assembly for review, referral to a committee of the Legislative Assembly or other action as the Legislative Assembly considers appropriate,

(h) in the case of a prescribed service provider, in accordance with the regulations made under section 4.2(1)(i).

4.2(1) The Lieutenant Governor in Council may, in addition to any applicable regulations made under section 36, make regulations

(i) respecting the reporting and recommendations to which a prescribed service provider may or must be subject under this Act;

4. The limited ability of the Commissioner to address/rectify "reprisals"

We took issue with the definition of "reprisals" in the act. We mentioned that the use of the word "person" in the first paragraph leads to the implication that reprisals are not limited to individuals employed by or contracted to a department, public entity or office of the Legislature. We suggested that there was a potential conflict in scope between s 24(a) and (b) noting that sub-section (a) suggests that the reprisal may come from someone who has the ability to impact on conditions of employment, but that sub-section (b) is broad enough to include anybody, and is not limited to persons in the worksite.

The definition of "reprisals" has been slightly modified by the Act, but subsections (a) and (b) have remained unchanged. Here is the current section on reprisals:

Reprisal

24(1) This section applies to an employee or a prescribed service provider who has, in good faith,

(a) requested advice about making a disclosure as described in section 8 or, in the case of an employee of a prescribed service provider, the regulations made under Part 1.2, whether or not the employee made a disclosure,

(b) made a disclosure under this Act,

(c) co-operated in an investigation under this Act,

(d) declined to participate in a wrongdoing, or

(e) done anything in accordance with this Act.

24(2) No person shall take or direct, or counsel or direct a person to take or direct, any of the following measures against an employee of a department, a public entity, an office of the

Legislature, the Office of the Premier, an office of a minister or a prescribed service provider for the reason that the employee took an action referred to in subsection (1):

> (a) a dismissal, layoff, suspension, demotion or transfer, discontinuation or elimination of a job, change of job location, reduction in wages, change in hours of work or reprimand;
>
> (b) any measure, other than one mentioned in clause (a), that adversely affects the employee's employment or working conditions;
>
> (c) a threat to take any of the measures mentioned in clause (a) or (b).

24(3) Subject to the regulations, no person shall take or direct, or counsel or direct a person to take or direct, any measure prescribed in the regulations against a prescribed service provider for the reason that the prescribed service provider or an employee of the prescribed service provider took an action referred to in subsection (1).

We also noted that the Commissioner does not have the power to impose the fines for reprisal under section 49 of the Act. We mentioned that there must be a prosecution, trial, and conviction in order to impose the fine and recommended that it would be better to grant the Commissioner the ability to impose a fine, or other punishment, upon conclusion of the investigation.

Unfortunately section 49 has remained unchanged. The offences must still be prosecuted by the Department of Justice. The Commissioner does not have the power to impose fines or penalties.

5. The ability of the Commissioner to collect, use and disclose Health Information

We noted that the Commissioner is empowered to require disclosure of particular medical/health records but that "…it is not clear how the Commissioner's ability to demand production of health information ties into the obligation of a custodian of health information to limit disclosure to the least amount necessary to achieve the purpose, or to attempt to limit disclosure to unidentified information, and who decides those issues." We recommended that this potential conflict be addressed.

It appears that this advice has been taken into consideration and applied in the legislation. Section 28.1(2) specifically addresses the issue of not disclosing more information than is necessary. Section 29.1 imposes an obligation on the Commissioner to inform the identified induvial that their health information has been disclosed pursuant to an investigation under the Act.

Where disclosure restrictions continue to apply

28.1(2) Where a disclosure or a complaint of a reprisal involves personal information, individually identifying health information or confidential information, the employee who makes the disclosure or submits the complaint of a reprisal must take reasonable precautions to ensure that no more information is disclosed than is necessary to make the disclosure or complaint of a reprisal.

Issues and notice re disclosure of information

29.1(1) Except where this Act or the regulations provide otherwise, this Act prevails to the extent of any inconsistency or conflict with the *Freedom of Information and Protection of Privacy Act* or the *Health Information Act* or any other Act or regulation prescribed in the regulations for the purposes of this section.

(2) If the Commissioner receives individually identifying health information in connection with a disclosure or a complaint of a reprisal, or during an investigation under this Act, the Commissioner must use reasonable efforts to inform the identified individual that the Commissioner received the health information, that the disclosure relates to an investigation under this Act, and that any further disclosure of the individually identifying health information is governed by this Act.

We also noted that the Act makes no reference to whether the Commissioner must destroy, or otherwise protect, any copies of records at the end of an investigation.

Section 44.1 somewhat addresses this issue, holding that the Commissioner can make recommendations for orders respecting the management, preservation, and destruction of records in the custody of the Office of the Public Interest Commissioner. Presumably this applies to personal health information/records that have been disclosed during an investigation. Section 36 also permits the Lieutenant Governor in Council to make regulations concerning the management of health records.

Records management

44.1(1) On the recommendation of the Commissioner, the Standing Committee may make an order

> (a) respecting the management of records in the custody or under the control of the Office of the Public Interest Commissioner, including their creation, handling, control, organization, retention, maintenance, security, preservation, disposition, alienation and destruction and their transfer to the Provincial Archives of Alberta,
>
> (b) establishing or governing the establishment of programs for any matter referred to in clause (a),
>
> (c) defining and classifying records, and
>
> (d) respecting the records or classes of records to which the order or any provision of it applies.

(2) The *Regulations Act* does not apply to orders made under this section.

(3) The chair of the Standing Committee must lay a copy of each order made under subsection (1) before the Legislative Assembly if it is then sitting or, if it is not, within 15 days after the start of the next sitting.

36(1) The Lieutenant Governor in Council may make regulations

(w) respecting the collection, use and disclosure of information, including personal information, individually identifying health information or confidential information, for the purposes of this Act;

(x) respecting the confidentiality of information collected concerning disclosures and complaints of reprisal;

(y) respecting procedures for protecting the identity of individuals involved in a disclosure, a complaint of a reprisal or an investigation, including the employee making the disclosure, individuals alleged to have committed the wrongdoings and witnesses;

6. The discretion of the Commissioner regarding the initiation or termination of an investigation

We mentioned that the Commissioner has the discretion under the Act to either refuse to conduct an investigation, or to cease an investigation which is underway, but that there is no corresponding right of review or appeal specified in the Act, nor is there an obligation to report on the refusal or termination to either the Legislature or to the individual who disclosed the alleged wrongdoing. We noted that the only reporting requirements are in relation to investigations that are "completed."

Section 19(3) puts an obligation on the Commissioner to inform the relevant parties of his decision to not investigate or to discontinue an investigation. Section 33 seems to indicate that the Commissioner provides information re: investigations refused or discontinuance of investigations at the annual report to the Legislative Assembly.

When investigation not required

19(3) If the Commissioner decides not to investigate or to discontinue an investigation, the Commissioner must, in writing, inform the employee who made the disclosure and the affected department, public entity, office or prescribed service provider

(a) of the Commissioner's decision, and

(b) of the reasons for the decision.

Commissioner's annual report

33(1) The Commissioner must report annually to the Legislative Assembly on the exercise and performance of the Commissioner's functions and duties under this Act, setting out

(b) the number of disclosures received by the Commissioner under this Act, the number of disclosures acted on and the number of disclosures not acted on by the Commissioner,

(b.1) the number of disclosures referred by the Commissioner to a designated officer for investigation in accordance with Part 2 and the number of investigation

outcomes, enforcement activities or other follow-up reported concerning those disclosures,

(c) the number of investigations commenced by the Commissioner under this Act,

We also mentioned that even if a complainant, department, public entity, or office of the Legislature wished to seek a judicial (court) review of the Commissioner's decision, it is not clear how those entities would become aware of it. Section 52 now gives these entities the ability to appeal the Commissioner's decisions, in some situations.:

Proceedings of Commissioner not subject to review

52(1) Subject to subsection (2), no decision, report or proceeding of the Commissioner is invalid for want of form and, except on the ground of lack of jurisdiction, no proceeding or decision of the Commissioner shall be challenged, reviewed, quashed or called into question in any court.

(2) A decision of the Commissioner concerning a reprisal may be questioned or reviewed by way of an application for judicial review seeking an order in the nature of certiorari or mandamus if the application is filed with the Court of Queen's Bench and served on the Commissioner no later than 30 days after the date of the decision, report, proceeding or reasons, whichever is latest.

(3) The Court may, in respect of an application under subsection (2),

(a) determine the issues to be resolved on the application,

(b) limit the contents of the return from the Commissioner to those materials necessary for the disposition of those issues, and

(c) give directions to protect the confidentiality of the matters referred to in Part 4.1.

I trust this information is helpful in conducting your current assessment of the Act.

MC LENNAN ROSS LLP
LEGAL COUNSEL

Memorandum

To:	AMA Board of Directors	Date:	November 27, 2015
From:	Jon Rossall	File:	159512
Subject:	**Public Interest Disclosure (Whistleblower Protection) Act Review**		

Introduction

The Alberta Legislature has established the Select Special Ethics and Accountability Committee ("the Committee") to review four statutes, including the *Public Interest Disclosure (Whistleblower Protection) Act*[1] ("the Act"). That comprehensive review is mandated by the Act itself[2]. The AMA has been identified by the Committee as an interested stakeholder, and has been invited to provide a written submission to the Committee on or before January 4, 2016. The Committee may decide to hold public hearings, and if so the AMA will also have an opportunity to make oral submissions to the Committee.

McLennan Ross has been asked to do a preliminary review of the Act from the perspective of the medical profession to advise the Board on issues which might form the subject matter of the AMA's submission to the Committee.

Background

The Act was passed by the Legislature in 2012, and was proclaimed in force in April and June of 2013. The expressed purposes of the Act are as follows:

(a) to facilitate the disclosure and investigation of significant and serious matters in or relating to departments, public entities or offices of the Legislature, that an employee believes may be unlawful, dangerous to the public or injurious to the public interest,

(b) to protect employees who make those disclosures,

(c) to manage, investigate and make recommendations respecting disclosures of wrongdoings and reprisals,

(d) to promote public confidence in the administration of departments, public entities and offices of the Legislature, and

(e) any other purpose prescribed in the regulations.[3]

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[1] SA 2012, c. P-39.5

[2] S. 37 of the Act requires a comprehensive review of the Act and the submission of a report to the Legislative Assembly, with recommended amendments, within 2 years of the Act coming into force and then every 5 years thereafter.

[3] Act, s. 2(2)

To date, there are no other purposes identified in the regulations.

The Act applies to departments, offices of the Legislature and "public entities". Public entities in the health sector are defined in the regulations as including regional health authorities, subsidiary health corporations (Calgary Laboratory Services Ltd., CapitalCare Group Inc. and Carewest), Covenant Health and the Lamont Health Care Centre.

The Act focuses on the actions of "employees". The Act defines an employee as

> "an individual employed by, or an individual who has suffered a reprisal and has been terminated by, a department, a public entity or an office of the Legislature or an individual prescribed in the regulations as an employee"[4]

The regulations expand on this definition by including within the category of employee

> "…an individual who holds, or who has suffered a reprisal involving the termination of…an appointment as medical staff" or "privileges within a public entity"[5].

To translate, the Act has application to physicians who are have appointments under the AHS Medical Staff Bylaws, or who hold privileges in any of the facilities identified above.

The Act essentially provides for a Public Interest Commissioner, appointed by the Legislative Assembly, to provide two services: first, to investigate and report on complaints relating to alleged wrongdoings in or relating to departments, public entities or offices of the Legislature; and second, to investigate and report on alleged reprisals against employees of those bodies who disclose such wrongdoings.

Overview of the Act

Having reviewed the Act and the regulations from the perspective of the health profession, we have identified 6 areas of concern which we believe should be addressed by the Committee. These are:

1. The scope/definition of "wrongdoings"
2. The characterization of "employees"
3. The limited ability of the Commissioner to address/rectify "wrongdoings"
4. The limited ability of the Commissioner to address/rectify "reprisals"
5. The ability of the Commissioner to collect, use and disclose Health Information
6. The discretion of the Commissioner regarding the initiation or termination of an investigation

[4] Act, s. 1(g)

[5] Regulation, s. 1(2)(b)(ii)

1. The scope/definition of "wrongdoings"

"Wrongdoings" are defined in the Act as follows:

> **3(1)** This Act applies in respect of the following wrongdoings in or relating to departments, public entities or offices of the Legislature or relating to employees:
>
> (a) a contravention of an Act, a regulation made pursuant to an Act, an Act of the Parliament of Canada or a regulation made pursuant to an Act of the Parliament of Canada;
>
> (b) an act or omission that creates
>
> (i) a substantial and specific danger to the life, health or safety of individuals other than a danger that is inherent in the performance of the duties or functions of an employee, or
>
> (ii) a substantial and specific danger to the environment;
>
> (c) gross mismanagement of public funds or a public asset;
>
> (d) knowingly directing or counselling an individual to commit a wrongdoing mentioned in clauses (a) to (c).

The concern here is the threshold. While s. 3(1)(a) opens the door for the investigation of any contravention of an Act or regulation (presumably even a minor one), the acts or omissions which constitute a "wrongdoing" must be "substantial", must create a "specific danger", or must relate to a "gross mismanagement" of public funds or assets. Presumably it is the Commissioner who decides what is substantial and creates a specific danger, and what is gross mismanagement. It would be helpful to have some better definition or parameters, certainly for the benefit of an individual considering disclosing such actions.

As well, the scope of "danger to the life, health or safety of individuals" is not defined. Does this include economic interests? Is this a subjective test? And who decides, the individual who is the alleged victim, or the Commissioner?

2. The characterization of "employees"

As mentioned in the Background section, the Act focusses on the actions of employees. While an analysis of the regulation clarifies that this word includes physicians who have medical staff appointments or privileges in certain health care facilities, the use of the word "employee" is misleading. The scope of the definition clearly encompasses independent contractors, members of ARPs and other roles undertaken by physicians. It would be simpler if the Act referred to "individual", or "person" or "affected person" to clarify that the Act applies to more than just employees.

Also, the inclusion of members of a medical staff, or those with privileges may exclude certain categories of physicians, such as Residents or Medical Students. There is no reason in principle why those individuals should not be entitled to the same protections if they are providing services within a health care facility owner or operated by government.

3. The limited ability of the Commissioner to address/rectify "wrongdoings"

Put simply, the Commissioner is relatively toothless. While his/her investigative powers are extensive, at the conclusion of the investigation, the Commissioner must prepare a report that sets out his findings and reasons for those findings, and which makes recommendations regarding the disclosures and wrongdoings. The recipient of those recommendations is obliged to confirm what steps the department, public entity or office of the Legislature has taken or proposes to take to give effect to those recommendations. If the Commissioner is not satisfied with the reaction, then he/she makes a further report to either the Chief Officer of Executive Council, the Speaker, or to the Minister responsible for the public entity involved. It is not clear what, if anything, happens next.

While it is implicit that the ultimate recipients of the Commissioner's report will do "something", it is not clear what that is, and there is no requirement that any specific action be taken.

4. The limited ability of the Commissioner to address/rectify "reprisals"

"Reprisals" are defined in the Act as follows:

> **24** No person shall take or direct, or counsel or direct a person to take or direct, any of the following measures against an employee because the employee has, in good faith, sought advice about making a disclosure, made a disclosure, co-operated in an investigation under this Act, declined to participate in a wrongdoing or done anything in accordance with this Act:
>
> (a) a dismissal, layoff, suspension, demotion or transfer, discontinuation or elimination of a job, change of job location, reduction in wages, change in hours of work or reprimand;
>
> (b) any measure, other than one mentioned in clause (a), that adversely affects the employee's employment or working conditions;
>
> (c) a threat to take any of the measures mentioned in clause (a) or (b).

The use of the word "person" in the first paragraph leads to the implication that reprisals are not limited to individuals employed by or contracted to a department, public entity or office of the Legislature. Certainly s. 24(a) suggests that the reprisal may come from someone who has the ability to impact on conditions of employment.

However, s. 24(b) is broad enough to include anybody, and is not limited to persons in the worksite. "Any measure…that adversely affects the employee's employment or working conditions" could include telephone or email harassment from a stranger, or from the spouse of an individual in the worksite.

It's not clear if that was the intent, but certainly that is the effect of this definition.

The Commissioner is required to investigate alleged reprisals in the same manner as he/she investigates disclosures of wrongdoings. However, if there is a finding that there has been a

reprisal, then s. 49 of the Act makes that an offence punishable with a fine of up to $25,000 for a first offence, and up to $100,000 for a second or subsequent offence.

The problem is, the Commissioner does not have the power to impose that fine. It is necessary for there to be a prosecution, which means the Department of Justice needs to initiate and conduct a trial and secure a conviction. In addition, the prosecution must be commenced no later than 2 years after the alleged offence was committed.

This process is not outlined in the Act and is, in our view, creates needless duplication. It would be preferable to grant the Commissioner the ability to impose a fine or other punishment upon conclusion of the investigation.

5. The ability of the Commissioner to collect, use and disclose Health Information

The Commissioner is empowered to require "any person who, in the Commissioner's opinion, is able to give information" to disclose individually identifying health information, and is correspondingly empowered to inspect documents and records, including electronic health records.[6] Disclosure of these records is authorized pursuant to s. 35(1)(p) of the *Health Information Act*. However, it is not clear how the Commissioner's ability to demand production of health information ties into the obligation of a custodian of health information to limit disclosure to the least amount necessary to achieve the purpose, or to attempt to limit disclosure to unidentified information, and who decides those issues. It would be helpful if that potential conflict was addressed.

In addition, while s. 18(7)(d) of the Act provides that the Commissioner must return records to the person who provided them, it is not specified that any copies of the records must be destroyed or otherwise protected.

6. The discretion of the Commissioner regarding the initiation or termination of an investigation

The Commissioner has the discretion under the Act to either refuse to conduct an investigation, or to cease an investigation which is underway. While the instances in which he/she can exercise that discretion are identified:

> **19(1)** The Commissioner is not required to investigate a disclosure or, if an investigation has been initiated, may cease the investigation if, in the opinion of the Commissioner,
>
> (a) the subject-matter of the disclosure could more appropriately be dealt with, initially or completely, according to a procedure provided for under this or another Act or a regulation,
>
> (b) the subject-matter of the disclosure is being investigated in accordance with procedures established under section 5,
>
> (c) the disclosure relates to a matter that could more appropriately be dealt with according to the procedures under a collective agreement or employment agreement,

6 Act, ss. 18(5) and (6)

(d) the disclosure is frivolous or vexatious, has not been made in good faith or does not deal with a wrongdoing,

(e) the disclosure relates to a decision, action or matter that results from a balanced and informed decision-making process on a public policy or operational issue,

(f) the disclosure does not provide adequate particulars about the wrongdoing as required by section 13 to permit the conduct of a fair and effective investigation, or

(g) there is another valid reason for not investigating the disclosure.

(2) The Commissioner is not required to investigate a disclosure or, if an investigation has been initiated, may discontinue the investigation

(a) if more than 2 years has passed since the date that the wrongdoing was discovered;

there is no corresponding right of review or appeal specified in the Act, nor is there an obligation to report on the refusal or termination to either the Legislature or to the individual who disclosed the alleged wrongdoing. The only reporting requirements are in relation to investigations that are "completed"[7]. Even if a complainant, or a department, public entity or office of the Legislature wished to seek a judicial (court) review of the Commissioner's decision, it is not clear how those entities would become aware of it.

Conclusion and Next Steps

These are the areas that we feel have raised issues or concerns. The next step would be to prepare a formal submission to the Committee on or before January 4th incorporating these concerns, as well as any others that Board Members or AMA staff may have.

[7] Act, s. 22