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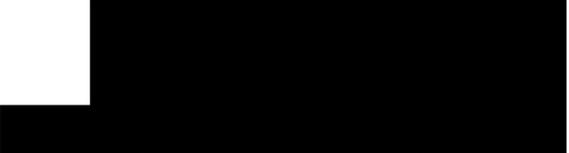
Dear Chair Loyola,

I am pleased to respond to the Standing Committee on Resource Stewardship's request for stakeholder input with respect to the *Conflicts of Interest Act*.

Enclosed is the joint submission of Justice and Solicitor General and the Public Service Commissioner for the Committee's consideration.

Thank you for the opportunity to provide our comments to the Committee.

Yours truly,



Philip Bryden, Q.C.
Deputy Minister of Justice and
Deputy Solicitor General

Standing Committee on Resource
Stewardship

Review of *Conflicts of Interest Act*

**Submissions by
Justice and Solicitor General
and
Public Service Commissioner**

February 26, 2018

Background

The *Conflicts of Interest Act* (COIA) helps ensure Members of the Legislative Assembly serve with integrity and impartiality. Parts of the COIA also apply to staff in the premier's and ministers' offices, and there are new provisions for public agencies. Conflicts-related rules for deputy ministers and other designated office holders are found in Part 2 of the *Public Service Act* (PSA).

The Ethics Commissioner is responsible for oversight and enforcement of these rules.

Recent changes to the *Conflicts of Interest Act*

2017: Substantive amendments to the COIA were made in fall 2017 by Bill 27, *Conflicts of Interest Amendment Act, 2017*. Most of these changes came into effect as of December 15, 2017.

- The changes added rules and requirements for public agencies.
- There are requirements for three broad groups:
 - **Public agencies** – must establish their own codes of conduct to prevent and address conflicts of interest.
 - **Senior officials (board chairs, CEOs and equivalent)** – restrictions on furthering private interests; using influence; using insider information; and concurrent employment. Must disclose real and/or apparent conflicts of interest.
 - **Designated senior officials (DSOs)** - Certain senior officials from significant public agencies will be designated by a future Order in Council. Once DSOs are identified, they will be subject to additional requirements, such as restrictions on holdings, financial reporting, and post-employment restrictions.
- Public agency codes of conduct are subject to review by the Ethics Commissioner.
- As some senior officials in public agencies are designated office holders under the *Public Service Act*, some of these provisions will replace certain designated office holder provisions currently in the *Public Service Act*.

2014: Significant amendments were made in 2014 by Bill 2, *Alberta Accountability Act*. These changes included:

- Extending the cooling-off period from six months to 12 months. The “cooling-off period” is the period of time that a person must wait before working for an organization with which they had dealings in their previous role.
- Adding premier's and ministers' staff to the COIA, with financial disclosure rules and conflict of interest rules similar to MLAs.

- Adding a new part to the PSA to parallel many of the conflicts of interest provisions that were already applicable to ministers, such as a 12-month cooling-off period for deputy ministers and other designated office holders, strengthened financial disclosure requirements, and a new administrative penalty for late filing.

Layout and context of these submissions

These submissions are being made by Justice and Solicitor General and the Public Service Commissioner. They were prepared with input from deputy ministers across government. We generally have not made comments on policy choices, except where there may be implications specific to the public service, public agencies or to other legislation.

These submissions are made bearing in mind submissions of Ms. Marguerite Trussler, Q.C., Ethics Commissioner, dated December 12, 2017.

In 2016, we made submissions on the COIA to the Select Special Ethics and Accountability Committee. As there have been significant changes to the COIA since that time, this document supersedes any prior submissions.

Submissions

Renumber the act and simplify the language (General 1)

The Ethics Commissioner's first suggestion was to renumber the COIA and simplify the language. We support this recommendation in principle. Ideally, it would be best to repeal the COIA in its entirety and replace it with new numbering, re-structured sections and plainer language. However, a key concern would be that a large re-write project could take significant time and resources.

Overall alignment between and consolidation of Acts and Codes (General 2)

The Ethics Commissioner recommended removing all conflicts-related provisions from the PSA and putting them into the COIA. The Commissioner also recommended that gift provisions should be put into the COIA instead of leaving them in codes of conduct.

Current

Following amendments in 2017, the COIA includes conflicts rules for Members of the Legislative Assembly and staff in premier's and ministers' offices. It also includes rules for senior staff in public agencies, while requiring codes of conduct to be created for other staff. Conflicts requirements for deputy ministers and a few designated office holders are still located in the PSA. Gift rules for MLAs are established in the COIA, while gift rules for political staff and public agencies are contained in codes of conduct.

All members of the Alberta Public Service (APS) are subject to *the Code of Conduct and Ethics for the Public Service of Alberta* (the APS Code). The APS Code

stipulates that employees are expected to conduct their duties with impartiality, and they are required to disclose to their Deputy Head (deputy minister) or designate any situation where they are, or may appear to be, in a conflict of interest situation.

Keeping in mind the obligations noted above, section 14 of the APS Code addresses gifting:

Acceptance of Gifts

(1) Employees shall not accept fees, gifts or other benefits that are connected directly or indirectly with the performance of their public service duties, from any individual, organization or corporation, other than:

- (a) the normal exchange of gifts between friends;
- (b) the normal exchange of hospitality between persons doing business together;
- (c) tokens exchanged as part of protocol;
- (d) the normal presentation of gifts to persons participating in public functions.

The Deputy Minister of Executive Council administers the APS Code with respect to deputy ministers.

The current role of the Ethics Commissioner within the framework of the APS Code is outlined in section 20:

Review of Decision

(1) An employee may apply to the Ethics Commissioner for a review of a ruling of a conflict of interest by a Deputy Head, (or in the case of Senior Officials a ruling by Executive Council) under this Code or a supplementary code issued by a department.

(2) The Ethics Commissioner will be asked to investigate and provide a recommendation to the Minister of the relevant department.

(3) Where the Ethics Commissioner is unable to act, the Minister will determine an alternate appeal mechanism in consultation with the Public Service Commissioner.

Considerations

Our overall comment on this topic is that it may remain appropriate for the public service and those outside the public service to be governed by different pieces of legislation, and for different rules to apply to different groups.

Deputy ministers and other designated office holders under the PSA are non-partisan. They are appointed and promoted on the basis of merit and are expected to remain neutral and impartial as provided for in the applicable code of conduct. While it is true that the senior officials and designated senior officials in public agencies governed by the new COIA provisions are appointed on merit and have roles that are separated from partisanship and typically require impartiality, the distinction between them and partisan political actors is reinforced by the fact that the specific conflict of interest rules governing their conduct are contained in agency codes of conduct that are reviewed by the Commissioner rather than in the COIA itself.

The PSA governs staff in the APS, including deputy ministers, while the COIA is largely meant to govern those outside of the public service, including elected

officials/political staff and, more recently, public agencies. Including deputy ministers, designated office holders in the public service, and the related gift provisions in the COIA may undermine the important distinction between elected officials/political staff and the non-partisan public service. It may make sense to keep these two groups separate, given that they have different roles and accountabilities. Other Canadian provinces and the federal government have maintained this distinction in their legislation.

In addition, the Ethics Commissioner appears to be suggesting that deputy ministers should be permitted, in some circumstances, to receive free tickets to conferences and events on behalf of a minister. Such practice could raise concerns about the impartiality of the public service. This concern could be lessened if the deputy minister paid for the ticket rather than receiving it for free.

On another note, since the Ethics Commissioner recommends that gift provisions for ministers, deputy ministers and political staff should all be aligned and incorporated into the COIA instead of in codes of conduct, there may also be questions about whether gift provisions for public agencies should be aligned as well.

For public agencies, the current framework was developed considering the broad range of entities it may apply to. A “one-size-fits-all” approach may not adequately consider the needs and realities of different agencies. As things are, codes of conduct must include fundamental requirements of impartiality and the need to avoid real and apparent conflicts of interest in relation to gifting. The rules for public agencies are also rather new, and it may be prudent to allow them to function for a longer period of time before changing them again.

Lastly, the Ethics Commissioner has also suggested that the legislation should be written to override any conflicting provisions in existing contracts. If this were to be pursued, careful legal analysis would be required to fully understand the potential for litigation.

Potential alternative approaches

Question 1: What is the best way to approach gifting provisions to maintain the neutrality of the public service?

- Option 1 (recommended): Maintain the current provisions, including the new provisions requiring codes of conduct for public agencies added last fall. Add a supplementary code of conduct for deputy ministers. This code of conduct could address the gift issues that the Ethics Commissioner raised. For example, a supplementary code could address situations where a deputy has been invited to attend a free event on behalf of the minister. This option would most clearly preserve the distinction between neutral deputy ministers and their ministers. This alternative would also allow rules applicable to the APS to be more nimble as the supplemental code may be amended from time to time.

- Option 2: The gifting provisions applicable to deputy ministers could be incorporated into legislation. However, in order to preserve a neutral public service, it would be necessary to maintain some differences between these provisions and the provisions for other groups.

Question 2: Who should administer the gifting provisions for deputy ministers?

- Option 1 (recommended): The gifting provisions for deputies could continue to be administered via the reporting relationship with the Deputy Minister of Executive Council. The existing mechanism allowing review by the Ethics Commissioner would be maintained. The Ethics Commissioner would also continue to administer the conflicts rules set out in Part 2 of the PSA.
- Option 2: The Ethics Commissioner could be given the authority to pre-authorize deputy ministers to accept gifts or attend free events, where appropriate.

Question 3: Should the conflicts provisions relating to deputy ministers and other designated office holders remain in the PSA or be moved to the COIA? This question applies more broadly than to gifts.

- Option 1 (recommended): leave the provisions in the PSA. As members of the public service, the rules for deputy ministers should be contained in a single statute: the PSA. This would clearly preserve the distinction between those covered by the COIA (non-public servants) and the PSA (public servants).
- Option 2: Move the provisions from Part 2 of the PSA into the COIA. This would allow all conflicts of interest provisions to be in one statute. However, it would mean that key terms and conditions governing the employment relationship of certain members of the APS would be in two pieces of legislation, namely, the COIA and the PSA.

Expanding those whose private interests are included (Policy 1)

The Ethics Commissioner recommended that the breadth of the definition of those whose private interests should not be furthered should be expanded to include siblings, parents, parents-in-law, and other relatives as well as friends.

Considerations

Generally, this is a policy question for consideration by the Committee. In principle, we agree that individuals should not be using their position to benefit the extended list proposed by the Commissioner. However, consideration should be given to whether including “friends” in this list is practical or enforceable. The term “friend” is vague, and it may be difficult for individuals to determine who is considered a friend for the purposes of the legislation, or even to know whether a particular decision could benefit someone they know. If the Committee adopts the recommendation, consideration should be given to providing more guidance on the meaning of the term friend.

Revise Ministerial, Deputy Minister and political staff post-employment restrictions (Policy 3)

The Ethics Commissioner suggested:

- (1) that the post-employment restrictions be clarified and simplified.
- (2) that the cooling-off period for ministers be extended to two years, but left at 12 months for deputy ministers and political staff.

Considerations

Any changes to post-employment restrictions should consider the fundamental differences between the roles of deputy ministers—who are impartial public servants—and ministers and political staff. Also, the potential for simplifying and clarifying the post-employment restrictions may be dependent on other policy recommendations from the Committee.

Process regarding returns related to direct associates (Policy 4)

The Ethics Commissioner recommended that direct associate reports of designated office holders and political staff be sent to the minister of Treasury Board and handled in the same way as Members' direct associate reports under section 16 of the *COIA*.

Considerations

Direct associate reports show who a person is directly associated with for the purposes of the *COIA* or *PSA*.

In general, direct associate reports filed by an individual (other than an MLA) are sent by the Ethics Commissioner to the minister or deputy minister responsible for that individual or to the Minister responsible for the relevant public agency. This ensures that for each person in question, both the Ethics Commissioner and the person's boss are aware of their direct associates. This process is consistent with reporting relationships.

If these reports were sent to the minister of Treasury Board rather than to the applicable minister or deputy minister, there may be implications under the *Freedom of Information and Protection of Privacy Act*. Because these reports include personal information, consideration should be given to requesting feedback from the Information and Privacy Commissioner about whether this proposal would create any privacy concerns and how those concerns could be addressed.

The Ethics Commissioner has commented that the individuals receiving these reports are unsure what to do with them. The Public Service Commissioner acknowledges these comments and will consider how to ensure those who receive the reports understand their purpose.

Allow the Ethics Commissioner to disclose certain information regarding investigations and advice (Policy 5)

The Ethics Commissioner suggested that:

- The Commissioner should be able to publicly confirm or deny that a request for an investigation has been received, and indicate whether or not an investigation is taking place.
- The Commissioner should be able to give a brief summary of the allegations.
- The Commissioner should be able to publicly state that advice has been given and followed.
- The COIA should be amended to clarify that no Member may publicly announce that a request for investigation has been submitted until the Ethics Commissioner has confirmed receipt of the complaint.

Considerations

The Committee may wish to consider whether there is a risk that elements of this proposal would discourage individuals to seek advice from the Ethics Commissioner and, if so, how that risk can be minimized.

It may be helpful for the Committee to look at other Alberta legislation relating to disclosure of information by legislative officers. For example, recent amendments were made to the *Public Interest Disclosure (Whistleblower Protection) Act*, which come into effect on March 1, 2018. These include a provision that allows, in some circumstances, the Public Interest Commissioner to disclose information if the Commissioner believes the public interest clearly outweighs any potential harm.

The Committee may also consider inviting comments from Alberta's Information and Privacy Commissioner.

Provide the Ethics Commissioner with the authority to review and reference privileged documents (Policy 7)

The Ethics Commissioner suggested that in the course of performing the duties of her office, the Ethics Commissioner should be able to review documents that are otherwise subject to solicitor-client, parliamentary, or legal privilege. The Ethics Commissioner suggested that there should be a way for her office to access such documents, and to reference parts of them, without the privilege being waived in other circumstances. The Ethics Commissioner also stated that the office should not have the right to question the validity of the claim of privilege.

Considerations

Privilege is an entrenched rule of substantive law in Canada, and any exceptions must be made based on a careful balancing of the competing interests. The Committee may wish to consider the following:

Preserving privilege – A basic tenet of our justice system is that all communications between a professional legal adviser and their clients are protected. In other words, such communications do not have to be disclosed under any circumstances unless the client consents to doing so. This helps ensure fairness and due process.

Under normal circumstances, disclosing privileged documents to the Ethics Commissioner could mean that the privilege has been waived in all circumstances. Disclosing privileged documents may result in others having a right of access, including those who are pursuing litigation against the government. This could have significant adverse effects on government. Any rule that would allow the Ethics Commissioner to see privileged records, even for the limited purpose of discharging her statutory functions, may be problematic and must be carefully considered.

If the Ethics Commissioner were able to access privileged documents, there would still be a question about what level of access would be fair and just. For example, the Committee may wish to consider whether it would be appropriate for the Ethics Commissioner to see privileged documents that contain legal advice directly related to an investigation, as opposed to the conduct that gave rise to the investigation.

Consistency - The legal rules governing privilege could impact legislation administered by other officers of the Legislative Assembly. If changes are made relating to disclosure of privileged documents, it might be helpful to have consistent rules applicable to all such officers.

Replacing the term “adult interdependent partner” (Policy 11)

The Ethics Commissioner suggested that the term adult interdependent partner should not be used to decide if a person is directly associated with a Member. The reason for this suggestion is that it generally takes three years of cohabitation for two people to be considered adult interdependent partners, but the Ethics Commissioner recommends that a person should be considered a direct associate for the purposes of the COIA after one year of cohabitation. The Ethics Commissioner suggested that adult interdependent partner be replaced with “an adult who has lived with the Member in a conjugal relationship for more than one year.”

Considerations

People can become adult interdependent partners if they live together in a relationship of interdependence for at least three years, of some permanence and have a child together, or immediately upon signing an agreement. The term adult interdependent partner is not limited to people in conjugal relationships.

Therefore, changing the terminology may inadvertently limit the application of the provision. The Committee may wish to consider whether it would be preferable to keep the reference to adult interdependent partners and add an additional category for people living in a conjugal relationship for at least one year.

Consideration could also be given to whether such a change could create inconsistencies with other legislation where rights and obligations attach to adult interdependent partners only.

If this change is adopted in relation to Members, consideration should also be given to applying consistent definitions to political staff, individuals impacted under Part 4.3, and those governed under the *Public Service Act*.

Restrict the exemption for mutual funds in the definition of securities (Policy 12)

The Ethics Commissioner recommended a change to mutual fund rules as they apply to ministers.

Considerations

Pursuant to section 23.92(3) of the COIA, this change would also apply to the provisions in Part 4.3 of the COIA. This term is also found in Part 2 of the PSA. The Committee could consider whether to make this change consistent for all impacted groups.

Require Assistant Deputy Ministers to provide annual financial disclosure to the Ethics Commissioner (Policy 15)

The Ethics Commissioner recommended that Assistant Deputy Ministers should be required to provide annual financial disclosure to the Ethics Commissioner. However, they should not be restricted in terms of personal investments unless the Ethics Commissioner determines that the individual has private interests or investments that might create a potential for the individual to make or influence government decisions that might affect their personal interests or investments.

Further, Assistant Deputy Ministers should only be required to meet with the Ethics Commissioner where their annual return raises potential questions in terms of conflicts of interest, or if they are randomly selected by the Ethics Commissioner for a meeting.

Considerations

This suggestion raises concerns. Considerations include:

- The conflicts of interest provisions in the APS Code, along with other supporting mechanisms, such as supplementary codes and financial management risk indicator screening, provide significant and sufficient ethical protection for the Government of Alberta.
- Specifically, upon commencement, individuals in positions named in the PSC's *Security Screening Directive* (found at <http://www.psc.alberta.ca/Practitioners/?notoc&file=directives/staffing/security-screening&cf=74>), including members of Minister Executive Committees are required to complete a Financial Management Risk Indicator Screening. The

purpose of this screening is to identify any potential risks to the employer where an individual has fiscal responsibility for significant budgets and/or expenditures.

- The APS Code requires that employees disclose to their Deputy Head or designate any situation involving them which is a conflict or an apparent conflict of interest.
- In addition, section 8 of the APS Code provides:
 - Employees are in conflict of interest and in violation of this Code if they:
 - (a) take part in a decision in the course of carrying out their duties, knowing that the decision might further a private interest of the employee, their spouse or minor child, or
 - (b) use their public role to influence or seek to influence a Government decision which could further a private interest of the employee, their spouse or minor child, or
 - (c) use or communicate information not available to the general public that was gained by the employee in the course of carrying out their duties, to further or seek to further a private interest of the employee, their spouse or minor child.
- Depending on the nature of the business being conducted, a departmental supplementary code may also require financial disclosure and require further action—such as liquidating financial interests—if a conflict of interest is identified. For example, the department of Energy requires branch heads and executive committee members to complete the Non-Conflict Certification for Financial Disclosure Form and submit it to the executive director of human resources. The form must be completed upon commencement and reviewed annually. As necessary, the deputy minister provides direction to the employee if a conflict of interest is identified.
- Other supplementary codes (e.g. Health, Treasury Board and Finance) discuss the need for employees to disclose business and financial interests where they may be in a conflict of interest with their public service duties.
- Comparative analysis reveals that other jurisdictions look at the requirements of the position (i.e. interaction with the private sector) to determine if financial disclosure is required as opposed to mandating disclosure for entire classes of employees.
- Expanding annual financial disclosure obligations to include Assistant Deputy Ministers may have significant workload implications for the Office of the Ethics Commissioner. It is worth noting that the recent amendments to the COIA have already added significantly to the Commissioner’s workload.

We thank the Committee for the opportunity to provide comments on potential changes to the *Conflicts of Interest Act*.