

February 4, 2019

The Honourable Darryl Plecas
Speaker of the Legislative Assembly
Chair, Legislative Assembly Management Committee
Parliament Buildings
Victoria BC V8V 1X4

Dear Chair and Members of the Legislative Assembly Management Committee,

There has been considerable recent discussion at the Legislative Assembly Management Committee and in the public about accountability and transparency in the operations of the Legislative Assembly. This discussion offers an excellent opportunity to enact a modern transparency and accountability framework for the administrative aspects of the Legislative Assembly. A new framework will, over time, restore public confidence in this vital public institution.

The recently initiated audit by our colleague the Auditor General is a foundational measure that, once completed and any resulting changes implemented, will no doubt serve to move the administration of the Legislative Assembly forward.

However, in addition to addressing the current issues, it is likely that longer term changes will be in order. In our view, there are three other reasonable and common-sense changes to legislation that can be taken to enhance accountability, transparency and good governance in the administrative aspects of the operation of the Legislative Assembly. Specifically, we urge all legislators to, in the public interest, enact a framework that ensures that the Legislative Assembly is subject to freedom of information law, offers statutory public interest disclosure recourse and protection to Legislative Assembly staff, and enables oversight of processes to ensure that Legislative Assembly staff are appointed on merit and dismissed only in accordance with fair dismissal practices.¹

We underscore at the outset that our recommendations refer to the Legislative Assembly in what might be termed its administrative functions, as a public institution. The Legislative Assembly is in many respects a public institution like any other. It employs people, owns property and provides services. It spends taxpayer dollars in doing so. When it discharges these functions there is no policy reason to exempt it from accountability and transparency rules that apply to other public institutions.

¹ There can be no concern that the proposed legislation would infringe on the privileges or immunities of the Legislative Assembly. The Legislature has the authority to define those privileges and immunities. Among other things, section 50 of the *Constitution Act* provides that the "Legislature may define the privileges, immunities and powers to be held, enjoyed and exercised by the Legislative Assembly and by the members of the Legislative Assembly" (those privileges, immunities and powers are affirmed in the *Legislative Assembly Privileges Act*). Also see *Canada (House of Commons) v. Vaid*, 2005 SCC 30, which accepts that the legislature can expressly eliminate or encroach on a parliamentary privilege. For greater certainty, the legislation we propose could expressly provide that it does not infringe on the Legislative Assembly's privileges or immunities.

To be clear, we do not suggest that any of the reforms discussed below should apply to individual Members of the Legislative Assembly in their constituency work or House functions, or to the Legislative Assembly in its functioning as British Columbia's democratically-elected deliberative and legislative body. The following discussion is about what might be called the corporate Legislative Assembly.

We wish to emphasize that we are making these suggestions regardless of the resolution of the status of the suspended permanent officers. On a broad policy basis we are of the view that the transparency and accountability changes we are proposing are worthwhile and timely.

We also wish to emphasize that we recognize these three suggestions are only a modest part of transparency and accountability reform. They are not designed to address the immediate issues before your committee. Having said that we believe that, over the medium term, they represent prudent, common sense modernization of the administration of the Legislative Assembly.

Given the above context, our recommendations for improvement fall in three areas.

Freedom of information

Like all freedom of information laws, British Columbia's *Freedom of Information and Protection of Privacy Act* is based on the recognition that access to information is in the public interest because it helps to hold governments to account for their actions and decisions. This includes the expenditure of public funds. The right of access to information is of course not absolute, and the *Freedom of Information and Protection of Privacy Act* protects important interests by excluding some classes of records from access and by enabling information to be withheld under specific, limited exceptions.

There is no reason why the Legislative Assembly should not, in respect of its institutional, administrative functions, be subject to the same transparency and accountability rules as the more than 2,900 public bodies across the province are. The executive branch of government, all local governments, universities, schools and many other institutions have complied with the access to information rules in place for over 25 years in British Columbia. It is time for the Legislative Assembly to meet the same standards.

Extending the *Freedom of Information and Protection of Privacy Act* to the Legislative Assembly will not impinge on its important work as the legislative branch of government. The Act can be extended to the Legislative Assembly in a way that, importantly, ensures that the constituency work of Members of the Legislative Assembly is not affected.²

We underscore the fact that compliance with the *Freedom of Information and Protection of Privacy Act* is overseen by an independent Officer of the Legislature, the Information and Privacy Commissioner, who is at arm's-length from the executive branch of government. We also note that the Information and Privacy Commissioner's role in adjudicating freedom of information matters is subject to independent judicial oversight, through judicial review in the Supreme Court of British Columbia. There would thus be effective oversight of Legislative Assembly compliance

² Case law already exists that supports the view that a constituency record of a Member of the Legislative Assembly or of the Executive Council would not be in the custody or under the control of a public body and therefore would not be subject to the *Freedom of Information and Protection of Privacy Act*, but this could be made express when extending that Act to the Legislative Assembly through an amending provision such as section 4(1) of Alberta's *Freedom of Information and Protection of Privacy Act* which provides that the Act does not apply to "personal or constituency" records of MLAs.

with the *Freedom of Information and Protection of Privacy Act* and effective oversight of the Information and Privacy Commissioner's decisions.

Public interest disclosure recourse and protection for employees of the Legislative Assembly

Last May, the Legislature passed whistleblowing legislation in the form of the *Public Interest Disclosure Act*. The first phase of that Act is expected to come into force later this year. Once the Act comes into force, staff and former staff of government ministries and nine independent offices of the Legislature³ will be legally entitled to disclose wrongdoing, notwithstanding their common law duties, employment oath of confidentiality, contractual non-disclosure obligations, or any statutory confidentiality provision that otherwise might preclude them from disclosing a matter. Employees may make disclosures of wrongdoing to their supervisor or a senior official in their ministry or office, or externally to the Ombudsperson. Disclosures will be investigated where appropriate in accordance with the legislative framework established by the Act.

The Act prohibits reprisal against public servants who report their good-faith concerns about possible wrongdoing or who cooperate with investigations. The Ombudsperson also has authority under the Act to investigate complaints about reprisal.

However, the Act on its face does not apply to the Legislative Assembly. We recommend an amendment to apply the Act to the administrative functions of the Legislative Assembly.⁴ Implementation work is already underway to prepare organizations for the coming into force of the Act. An early amendment would allow implementation work to begin for the Legislative Assembly in the same manner.⁵

Appointment of employees of the Legislative Assembly

Appointments of employees to and within the Legislative Assembly are not subject to the provisions of the *Public Service Act* which apply to other public service appointments. These provisions require that appointments be based on merit and be subject to review by the Merit Commissioner, an independent officer of the Legislature. The Merit Commissioner is also responsible for the review of processes related to just cause dismissals. A similar type of oversight of appointments to and within the staff of the Legislative Assembly, and of any just cause dismissals would provide some assurance to the Legislative Assembly and the public that fair hiring and dismissal practices are in place within the Assembly's administration.

As the Merit Commissioner's responsibilities are outlined in the *Public Service Act*, legislative amendment would be necessary if the Commissioner's mandate was to be broadened to encompass monitoring of appointment and dismissal processes as they apply to the staff of the Legislative Assembly.

³ Ombudsperson, Information and Privacy Commissioner, Representative for Children and Youth, Police Complaint Commissioner, Merit Commissioner, Auditor General, Chief Electoral Officer, Human Rights Commissioner, Registrar of Lobbyists

⁴ This approach is not novel. The public interest disclosure laws of several provinces apply, in various ways, to their respective legislative assembly.

⁵ We note that there is a power for the Lieutenant Governor in Council to enact a regulation declaring an "organization" to be a "government body" and thus be subject to the Act. However, even if such a regulation were possible in respect of the Legislative Assembly (a matter we have not had the opportunity to consider in depth), we would recommend that coverage of the Legislative Assembly be effected through an amendment to the Act, rather than by such a regulation, given the unique status of the Legislative Assembly.

Appointment of the senior officers of the Legislative Assembly, including the Clerk of the Legislature, the Clerk Assistant, the Sergeant at Arms, the Law Clerk and the Clerk of Committees, may require a bespoke merit-based Legislative Assembly process that is enshrined in statute.⁶ As those making such appointments would likely be accountable to the entire Legislative Assembly for their decisions, other monitoring would not be required.

In our view, these three changes will, along with no doubt further changes that arise from the Auditor General's work, will contribute to a transparent, efficient, accountable and effective Legislative Assembly.

It is our intention to publicly release this letter tomorrow.

We would be pleased to discuss any or all of these matters further with the committee.

ORIGINAL SIGNED BY

Michael McEvoy
Information and Privacy
Commissioner

ORIGINAL SIGNED BY

Fiona Spencer
Merit Commissioner

ORIGINAL SIGNED BY

Jay Chalke
Ombudsperson

cc: Carol Bellringer, Auditor General

⁶There are precedents for appointing various independent statutory officers. Many of the officers (for example the Information and Privacy Commissioner and the Ombudsperson) can only be appointed on the unanimous recommendation of an all-party committee of the Legislative Assembly. That recommendation must then be approved by the entire Legislative Assembly, after which the Lieutenant Governor appoints that individual to the post. This and similar processes ensure merit-based appointments that are publicly-endorsed in the full Legislative Assembly. This is not, of course, the only approach. The key is to ensure that a framework is introduced that ensures that merit is considered in all appointments of senior Legislative Assembly officers.