



July 7, 2015

Mr. Scott Hamilton, Chair
Select Standing Committee on Finance
and Government Services
c/o Parliamentary Committees Office
Room 224 Parliament Buildings
Victoria BC V8V 1X4

Ms. Carole James, Deputy Chair
Select Standing Committee on Finance
and Government Services
c/o Parliamentary Committees Office
Room 224 Parliament Buildings
Victoria BC V8V 1X4

Dear Chair and Deputy Chair:

RE: Possible Referral of a matter under s. 10(3) of the *Ombudsperson Act*

I. Introduction

The purpose of this letter is to identify several matters that I, as Ombudsperson, respectfully recommend that the Select Standing Committee on Finance and Government Services ("the Committee") carefully consider as it deliberates on the Minister of Health's July 3, 2015 letter to the Committee. I write this letter now as it is my understanding that the Committee may commence its consideration of the Minister's letter as early as tomorrow.

I wish to make it clear at the outset that the purpose of this letter is not to advocate for or against a referral of this matter to my office. It is to ensure that if a referral to my office is made, such referral is based on a realistic understanding of what an Ombudsperson investigation would entail, a proper assessment of the legislative and practical measures that would be necessary to ensure that my office can carry out this task fully and effectively, and a careful consideration of the conditions that are necessary to ensure public confidence in its outcome.

II. The Minister's letter

Minister Lake's letter identified "the ongoing public interest and concern with respect to the decision to terminate a number of employees in the Ministry of Health in 2012". It stated that: "In my opinion, a further review of this matter is appropriate and I believe that

the Ombudsperson is the proper venue for such an investigation". Citing section 10(3) of the *Ombudsperson Act*, the Minister made the following request of the Committee:

... I would ask the Committee to have the Ombudsperson investigate the events leading up to the decision to terminate the employees, the decision to terminate itself, and the actions taken by government following the terminations, in addition to any other matters he may deem worthy of investigation.

III. The Referral Power

Section 10(3)-(5) of the *Ombudsperson Act* read as follows:

10(3) The Legislative Assembly or any of its committees may at any time refer a matter to the Ombudsperson for investigation and report.

(4) The Ombudsperson must

- (a) investigate the matter referred under subsection (3), so far as it is within the Ombudsperson's jurisdiction and subject to any special directions, and
- (b) report back as the Ombudsperson thinks fit.

(5) Sections 23 to 26 do not apply in respect of an investigation or report made under subsection (4).

I have been advised that, to date, my staff have been unable to locate any prior instance, in the 35 year history of this office, of a referral under s. 10(3). That does not, of course, mean that such referrals are inappropriate. That the situation here is at least very rare and perhaps unprecedented does, however, commend that great care be taken at the initial stages, before irrevocable actions are taken and public funds are expended. It is essential that any significant issues that might arise down the road are identified as early as possible and addressed proactively. Care must also be taken to ensure that Committee members are well aware of what would, and would not, be involved in an Ombudsperson investigation as opposed to some other process such as a public inquiry under the *Public Inquiry Act*.

Subsection 10(4) of the *Ombudsperson Act* makes clear that a s. 10(3) referral may only be investigated "so far as it is within the Ombudsperson's jurisdiction..." This language is important: the key point is that a referral under s. 10(3) must be conducted *within* the legal structure of the *Ombudsperson Act*.

IV. The private nature of Ombudsperson investigations

A central aspect of the statutory structure under the *Ombudsperson Act* concerns the private nature of Ombudsperson investigations, as set out clearly in s. 9(6) of the *Act*:

9(6) An investigation under this Act must be conducted in private unless the Ombudsperson considers that there are special circumstances in which public knowledge is essential in order to further the investigation.

Thus, while an Ombudsperson's final report may be made public, the very nature and strength of Ombudsperson investigations is that they are conducted in private. The experienced investigative staff of the office consider the ability to conduct investigations in private as integral to our success. This has also been recognized in litigation involving this office: "The confidentiality aspect of the legislation is paramount and fundamental, and without it the Ombudsman could not function": *Levey v. British Columbia (Ombudsman)*, [1985] B.C.J. No. 1236 (S.C.) at 3. This office, like our counterpart offices in other jurisdictions, has enjoyed complete candour from witnesses because of the confidence that they have in the Ombudsperson's process and also because of the assurance that what they say will be kept private other than as included in a report.

I am aware that there is great interest among the public in this matter, and no doubt many would like to see the entire process conducted in public. However, the *Ombudsperson Act* does not allow the Ombudsperson to conduct a public process on that basis or to turn an Ombudsperson investigation into a *de facto* public inquiry based on public interest in the particular investigation.

The test set out in determining whether any aspect of an Ombudsperson investigation is to be conducted other than in private is in s. 9(6) which asks whether "there are special circumstances in which public knowledge is essential in order to further the investigation." While I have no intention of prejudging anything now, it is safe to observe that the statutory test raises very different considerations from whether the matter is one of public interest. I wish the Committee to be aware that the *Ombudsperson Act* requires that the presumptive approach of any Ombudsperson investigation resulting from a referral will be that the investigation will be conducted in private. I appreciate that there are other processes available which are more public in their nature and to that extent the Committee will need to determine the approach that is most appropriate for this matter.

V. Potential impediments to obtaining information

Another highly relevant matter for the Committee to consider is whether my office in fact has the legal authority to obtain all of the information it will require to fully investigate the issues the Minister has proposed that the Committee refer to my office. As I understand it, the inability of the previous process to compel information is precisely why the government is now seeking a more formal statutory process.

In this regard, I must point out that the Ombudsperson's power to compel evidence set out in s. 15, which is "subject to this *Act*", must be read with s. 19 of the *Ombudsperson Act*, which provides as follows:

19 (1) Subject to section 18, a rule of law that authorizes or requires the withholding of a document or thing, or the refusal to disclose a matter in answer to a question, on the ground that the production or disclosure would be injurious to the public interest does not apply to production of the document or thing or the disclosure of the matter to the Ombudsperson.

(2) Subject to section 18 and to subsection (4), a person who is bound by an enactment to maintain confidentiality in relation to or not to disclose any matter must not be required to supply any information to or answer any question put by the Ombudsperson in relation to

that matter, or to produce to the Ombudsperson any document or thing relating to it, if compliance with that requirement would be in breach of the obligation of confidentiality or nondisclosure. [emphasis added]

(3) Subject to section 18 but despite subsection (2), if a person is bound to maintain confidentiality in respect of a matter only because of an oath under the Public Service Act or a rule of law referred to in subsection (1), the person must disclose the information, answer questions and produce documents or things on the request of the Ombudsperson.

(4) Subject to section 18, after receiving a complainant's consent in writing, the Ombudsperson may require a person described in subsection (2) to, and that person must, supply information, answer any question or produce any document or thing required by the Ombudsperson that relates only to the complainant.

I have three serious concerns arising from s. 19 of the *Ombudsperson Act* as applied to this case.

A. Statutory confidentiality provisions

My first concern is that s. 19(2) of the *Ombudsperson Act* will prohibit any person who is bound by a statutory confidentiality clause (as opposed to the *Public Service Act* oath or a common law rule) to provide my investigators with testimony or documents in the referred investigation. This is a very serious matter. While statutory confidentiality clauses may have been rare when s. 19 was first enacted, they are commonplace today, particularly in respect of health data protection and as set out in privacy protection statutes such as the *Freedom of Information and Protection of Privacy Act*. Given the subject area proposed to be investigated, I am very concerned about s. 19(2) acting as a serious impediment to any referred investigation if the *Ombudsperson Act* is not amended.

I note that the more modern "officer" statutes contain no such restrictions. For example, s. 10 of the *Representative for Children and Youth Act (RCYA)* provides as follows:

10 (1) In this section, "officer of the Legislature" has the same meaning as in the *Freedom of Information and Protection of Privacy Act*, but does not include the representative.

(2) The representative has the right to any information that

(a) is in the custody or control of

(i) a public body other than an officer of the Legislature, or

(ii) a director, and

(b) is necessary to enable the representative to exercise his or her powers or perform his or her functions or duties under this Act.

(3) The public body or director must disclose to the representative the information to which the representative is entitled under subsection (2).

(4) This section applies despite

(a) any claim of confidentiality or privilege, other than a claim based on solicitor-client privilege, and

(b) any other enactment, other than a restriction in section 51 of the *Evidence Act*.

My concern about this issue is so significant that I would formally ask that the Committee not refer this matter to my office unless it is accompanied by a recommendation to government for an urgent legislative amendment that would either (a) repeal s. 19 of the *Ombudsperson Act* and substitute in its place a provision akin to s. 10 of the *RCYA*, or (b) make clear at least that in an investigation arising from a referral under s. 10(3) of the *Ombudsperson Act*, s. 19 of the *Ombudsperson Act* does not apply and that a person or authority is required to provide information to the Ombudsperson despite any claim of confidentiality or privilege except solicitor client privilege.

Without such an amendment, I predict that the result will, at best, be litigation, cost and delay commenced by one or more persons concerning the Ombudsperson's right to information, and, at worst, the inability of this office to obtain key information. Indeed, the prospects for litigation heighten considerably where, as here, the Ombudsperson is being asked to take the unusual step of issuing a report that might potentially make findings that could adversely impact on the reputations of individuals, rather than undertaking the office's usual role of looking for solutions to problems of maladministration by public authorities in reports which are typically not personalized.

I therefore ask that the Committee not refer this matter to this office unless it also confirms that it has obtained a commitment from government that it is prepared to introduce legislation to amend the *Ombudsperson Act* in the manner outlined above in the current session.

B. Section 18 of the Ombudsperson Act and access to Cabinet records

My second concern arising from s. 19 of the *Ombudsperson Act* lies in its reference to s. 18 of the *Act*, which authorizes the Attorney General to prohibit this office from seeking information where the Attorney General "certifies" that the information might impede an investigation or disclose deliberations of the Executive Council either generally or on "secret or confidential" matters that would "be contrary or prejudicial to the public interest". Section 18 states:

18 (1) The Ombudsperson must not enter any premises and must not require any information or answer to be given or any document or thing to be produced if the Attorney General certifies that entering the premises, giving the information, answering the question or producing the document or thing might

- (a) interfere with or impede the investigation or detection of an offence,
- (b) result in or involve the disclosure of deliberations of the Executive Council, or
- (c) result in or involve the disclosure of proceedings of the Executive Council or a committee of it, relating to matters of a secret or confidential nature and that the disclosure would be contrary or prejudicial to the public interest.

(2) The Ombudsperson must report each certificate of the Attorney General to the Legislative Assembly not later than in the Ombudsperson's next annual report.

This office has a long standing expectation of access to Cabinet records which has been formalized by a protocol (attached) which states that,

“Upon receiving Notice [from the Ombudsperson] the Official will coordinate and collect all requested Cabinet Records, will provide the Cabinet Records to the Ombudsperson for review and will, upon production of records to the Ombudsperson, identify the steps taken to collect the information.”

The protocol provides that a mechanism be followed should the Attorney General seek to issue a certificate. My strong preference, if a referral is made, would be that this protocol be followed rather than a certificate be unilaterally issued pursuant to subsections 18(1)(b) and (c) in respect of this investigation. If the matters referred for investigation were discussed at Cabinet, that information should not be withheld from my investigators.

The established protocol applies specifically to records. I expect the same mechanisms in the protocol to apply to individuals who may be asked to give statements protected by Cabinet confidence. I would ask that the Committee seek an assurance from the Government that they will apply the existing protocol not only to records but also to the other circumstances contemplated in section 18.

C. Confidentiality provisions of settlement agreements

Media reports indicate that some of the impacted former employees are subject to confidentiality provisions as a term of resolving previous litigation.

My office does not know the terms of these confidentiality provisions and thus is unable to determine whether, and if so how, s. 19 of the *Ombudsperson Act* might apply to the circumstances of these individuals, including whether there might be statutory provisions directly or indirectly in place forbidding their disclosure. This not only underscores the need for an amendment to s. 19 of the *Ombudsperson Act* as recommended above, but it also reinforces the need for the Committee to recommend, as part of any referral, that government agree to release the affected employees from their confidentiality obligations for all purposes relating to any referral, investigation and report by this office.

VI. Government legal advice pertaining to the employee firings

Subsection 11(1)(b) of the *Ombudsperson Act* provides:

11 (1) This Act does not authorize the Ombudsperson to investigate a decision, recommendation, act or omission

...

(b) of a person acting as a solicitor for an authority or acting as counsel to an authority in relation to a proceeding. [emphasis added]

I cite this provision to make it clear that the effect of this section is that the Ombudsperson is precluded from investigating the conduct of lawyers acting as solicitor or counsel for the government.

I hasten to add that this section does would not prevent the Ombudsperson from obtaining the legal advice that may have been given to government officials. This may be essential in order to determine whether legal advice was obtained concerning a matter, and if obtained, whether it was considered and followed. In this regard, I note that my office does have a standing Memorandum of Understanding with the Ministry of Justice for this purpose generally.

VII. Preventing overlap with and prejudice to other processes

Two issues arise here.

First, in the ordinary course of serving British Columbians, the Officers of the Legislature share information and collaborate to ensure that overlapping investigations are avoided and taxpayer money is efficiently spent. That practice should continue even in the event a referral is made under s. 10(3). The Information and Privacy Commissioner has already conducted one review in this matter and the Auditor General has publicly expressed her intent to carry out an audit into aspects of this matter at some point in the future.

Therefore I would request that the Committee, in the event a referral is made, also expressly acknowledge that my office be permitted to limit our investigation in order to avoid duplication with any other Officer of the Legislature who, under their own act, is carrying out their statutory role.

Second, consideration needs to be given to any impact of an investigation by my office as it pertains to ongoing litigation before courts or arbitrators in connection with the firings in question. This office might normally exercise its discretion in s. 11 of the *Ombudsperson Act* to defer an Ombudsperson investigation pending the outcome of concurrent judicial or arbitral processes in order to avoid the spectre of inconsistent findings and the potential for prejudice to such processes. While s. 11 is not a “jurisdictional” limitation, I can advise you that, if this matter was referred to my office, the nature and circumstances surrounding those processes are matters I would have to consider that might enter into timing and investigative planning, and that would therefore commend against any artificially tight timelines for the conduct of this investigation and its outcomes.

VIII. Budget

If a referral is made under s. 10(3), my office “must” investigate and report. This is the only instance in the *Ombudsperson Act* of a mandatory duty on the Ombudsperson to carry out an investigation. In all other instances, the initiation and continuation of an investigation is discretionary. Many factors weigh on the exercise of that discretion, including the requirement that the office not exceed the budgetary amount allocated by the Legislative Assembly in any fiscal year. Any investigation arising from a referral in this matter will

have a significant impact on the resources of the office. An investigation of this type will involve dedicated investigators, records staff and a significant legal budget.

In the event a referral is made by the Committee, it would be my intention to develop a budget to carry out an investigation and to return promptly to the Committee on the expectation that the requested budget would be the subject of a further budgetary allocation. This is critically important because of the mandatory nature of s. 10(4). To refer a matter and fail to fully fund the resulting investigation would mean that other work of the office would have to be set aside. This would be, in my view, grossly unfair to the regular complainants to our office – many of whom have no other recourse to secure administrative fairness. Injured workers, car accident victims, single parents on social assistance and others must not have their recourse to the Ombudsperson shut off to address the referral of the Committee in this matter.

IX. Public confidence

In my respectful view, no referral should be made to this Office by the Committee unless the Committee is satisfied that there will be public confidence in the investigation and its outcome. Part of that confidence involves ensuring that this office has the legislative power to do the job, as outlined above. However, public confidence requires more than that.

A. Unanimous Committee support

In my view such confidence cannot exist firstly unless there is unqualified bipartisan support within the Committee for such a referral. Without the support of both parties represented on the Committee, I am very concerned about the potential appearance of politicization of this office, whose independence and impartiality are its most precious assets.

My concerns in this regard are reinforced by previous issues addressed by the Office. I note that, in 1991, a former cabinet minister sought an investigation by Ombudsman Owen into the former minister's own conduct. Premier Johnston did not object to the investigation. The Ombudsman indicated that he was uncomfortable with the partisan nature of the request and indicated he would not carry out an investigation unless the Leader of the Opposition supported such an investigation. The investigation ultimately did not take place. Although the circumstances are different, I share Ombudsman Owen's well placed discomfort.

Whatever the Committee decides to do in this matter, I would ask that it do so unanimously. It is clearly not in the public interest, or in the interest of my office that, for the duration of the investigation originating from a referral, there be a partisan division about whether the referral is a good and proper approach to address this issue.

B. The views of those most directly affected

The other issue is, of course, the confidence that such a report must elicit on the part of those most directly affected. In this regard, I note that ordinarily, the involvement of our

office is triggered by a complainant who chooses to come to our office, and who has the right at any time to withdraw a complaint, subject only to this office's right to continue an investigation on its own initiative.

As the Committee is no doubt aware, on July 6, 2015 a statement was released by the former Ministry of Health employees stating their view that investigation by the Ombudsperson is not the approach that they favour. Rather, the former employees express a preference for a public inquiry. In my view, the perspective of the former employees is very important and I would suggest that the Committee give those views the utmost consideration including inviting the employees to make submissions to the Committee before the question of whether to make a referral is decided.

X. Summary and Conclusion

As I indicate, the use of s. 10(3) of the *Ombudsperson Act* is, to the best of our knowledge, unprecedented. Therefore, not surprisingly, there are a number of pre-conditions that need to be addressed in order for a referral and the resulting investigation to be successful. The following are the issues that I am of the view need to be addressed in order that a referral and resulting investigation achieve that jointly held goal of success:

1. That the Committee consider the views of the former employees as to whether the matter ought to be referred under subsection 10(3) of the *Act* or an alternative approach pursued;
2. That no referral be made by the Committee unless there is unanimous support within the Committee for such a referral;
3. That any referral by the Committee expressly acknowledge:
 - a. the presumptive approach in the *Ombudsperson Act* that the investigation will be conducted in private;
 - b. that any terms of reference expressly accord the Ombudsperson discretion to restrict the scope of the investigation to avoid any duplication or overlap with a suitable process under any of the mandates of any other Officer of the Legislature;
 - c. that the Ombudsperson will, once terms of the referral are finalized, develop a budget and return to the Committee for funding; and
 - d. that no deadlines be placed on any investigation until such time as the Ombudsperson has the opportunity to provide the Committee with a considered opinion on this issue following receipt of any terms of reference, including the timing of any actions required to be taken by government and the legislature, as summarized below.
4. That no referral be made by the Committee unless it has a commitment from Government:

- a. to introduce legislation, at the earliest opportunity, to repeal and replace s. 19 of the Ombudsperson Act with an updated and effective provision, consistent with that of other officers of the legislature;
- b. to release parties from any confidentiality undertakings entered into as a condition of settling prior or outstanding litigation; and
- c. to disclose Cabinet records and legal advice in accordance with the established protocols and to extend the Cabinet records protocol to the other circumstances described in s. 18.

I appreciate the opportunity to provide the Committee with this letter. I am available to answer any questions the Committee might have. Otherwise, I respectfully await the outcome of your deliberations.



Jay Chalke
Ombudsperson
Province of British Columbia

Attachment: Protocol between the Ombudsperson and the Government of British Columbia

**Protocol between the Ombudsperson
and the Government of British Columbia**

IN THIS PROTOCOL:

"AG Restriction" means a restriction imposed by the Attorney General in exercise of the authority provided to the Attorney General under section 18 of the *Ombudsperson Act*, R.S.B.C. 1996, c. 340 (*OA*).

"Cabinet Records" means Cabinet documents and information that would reveal the substance of deliberations of the Executive Council or any of its committees, including any decisions, advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees, but excluding information described in s. 12(2) of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 (*FOIPPA*).

"Confidential Facilitated Discussions" means a facilitated discussion which follows the process set out in Appendix A to this protocol.

"Initial Disclosure" means any disclosure of Cabinet Records to the Ombudsperson under section 3 of this Protocol.

"Official" means the Deputy Cabinet Secretary, responsible for safekeeping of Cabinet Records.

"Ombudsperson" means the Ombudsperson appointed pursuant to the *OA*.

"Power to obtain information" means the Ombudsperson's power to obtain information pursuant to section 15 of the *OA*:

Power to obtain information

15 (1) The Ombudsperson may receive and obtain information from the persons and in the manner the Ombudsperson considers appropriate, and in the Ombudsperson's discretion may conduct hearings.

(2) Without restricting subsection (1), but subject to this Act, the Ombudsperson may do one or more of the following:

- (a) at any reasonable time enter, remain on and inspect all of the premises occupied by an authority, talk in private with any person there and otherwise investigate matters within the Ombudsperson's jurisdiction;
- (b) require a person to furnish information or produce, at a time and place the Ombudsperson specifies, a document or thing in the person's possession or control that relates to an investigation, whether or not that person is a past or present member or employee of an authority and whether or not the document or thing is in the custody or under the control of an authority;

(c) make copies of information furnished or a document or thing produced under this section;

(d) summon before the Ombudsperson and examine on oath any person who the Ombudsperson believes is able to give information relevant to an investigation, whether or not that person is a complainant or a member or employee of an authority, and for that purpose may administer an oath;

(e) receive and accept, on oath or otherwise, evidence the Ombudsperson considers appropriate, whether or not it would be admissible in a court.

(3) If the authority requests the return of a document or thing obtained under subsection (2), the Ombudsperson must return it to the authority within 48 hours after receiving the request, but the Ombudsperson may again require its production in accordance with this section.

“Public Report” means a report issued in the exercise of the powers and duties within the jurisdiction of the Ombudsperson, pursuant to the *OA*.

WHEREAS:

- The Ombudsperson’s power to obtain information includes the power to obtain information from a person, including an authority as defined in the *OA*.
- The Ombudsperson recognizes that on those occasions where Cabinet Records are required under s. 15 of the *OA*, Cabinet Records must be treated confidentially and with special sensitivity by the Ombudsperson given the nature of such documents.
- The mandate of the Ombudsperson under the *OA* includes the public reporting of findings and recommendations in the exercise of the mandate of the Ombudsperson under the *OA*.
- This Protocol applies only to Cabinet Records, and is without prejudice to other arrangements and procedures adopted by the Ombudsperson in relation to other confidential records received in the course of the duties of the Ombudsperson under the *OA*.
- The signatories to this Protocol wish to provide a process which will provide an opportunity for Cabinet Records to be provided to the Ombudsperson for review, consideration and discussion on a “without prejudice basis” while also preserving the right of the Attorney General to invoke the provisions of Ombudsperson Act section 18.

THEREFORE THE FOLLOWING PROTOCOL IS ESTABLISHED:

1. Notice of all requests for Cabinet Records will be directed to the Official, and to the head of any other authority the Ombudsperson believes has custody or control of the Cabinet records.
2. Where the Ombudsperson provides Notice under clause 1, the Ombudsperson will identify in writing the nature of the Cabinet Records sought to be disclosed and will

explain why, in the Ombudsperson's opinion, the Cabinet records relate to an investigation under the *OA*.

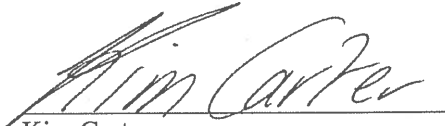
3. Upon receiving Notice under clauses 1 and 2, the Official will coordinate and collect all requested Cabinet Records, will provide the Cabinet Records to the Ombudsperson for review and will, upon production of records to the Ombudsperson, identify the steps taken to collect the information. If producing the information will take more than 21 days, the Official will notify the Ombudsperson of the delay and the reason therefor.
4. Any disclosure and receipt of Cabinet Records to the Ombudsperson under clause 3 will proceed on these understandings:
 - (a) The Government does not waive any privilege or statutory protection otherwise attached to the Cabinet Records by providing the Cabinet Records to the Ombudsperson.
 - (b) If any waiver by conduct does occur, it is only for the limited purpose of assisting the Ombudsperson in carrying out his or her statutory functions.
 - (c) No confidentiality, privilege or immunity is waived or defeated for any other purpose or as against any other person by their disclosure to the Ombudsperson, or by any subsequent disclosure in a Public Report by the Ombudsperson.
 - (d) Any Initial Disclosure will be deemed not to be a disclosure to the extent that such Initial Disclosure would interfere or prevent the making of an AG Restriction.
5. The Ombudsperson will, consistent with legal obligations under the *OA*, receive, store and treat Cabinet Records with the utmost security and confidence. The Ombudsperson will develop a policy pertaining to the storage and security of Cabinet Records that is consistent with substantive protections set out in the model policy attached as Appendix "B" to this Protocol regarding tracking, care, custody, duplication, physical security and breach of security.
6. A Public Report will not make reference to Cabinet Records unless the Ombudsperson determines that it is necessary to do so pursuant to s. 9(7) of the *OA*.
7. For greater certainty, no reference will be made to Cabinet Records in a Public Report unless the Ombudsperson determines that the public interest in confidentiality of Cabinet deliberations is outweighed by the public interest in disclosure, having regard to the following:
 - (a) The contents of the Cabinet Records themselves.
 - (b) The nature of the policy concerned.

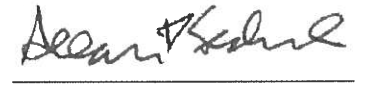
- (c) The time when information in a Cabinet Record is to be revealed.
 - (d) The subject matter of the Public Report, the availability of alternative means of addressing the matter in issue, and the need to disclose the Cabinet Record as the only means to ensure that the Public Report can be adequately and fairly presented.
 - (e) Whether disclosure is necessary to ensure the proper functioning of the Executive Branch in its treatment of citizens on the basis that there has been unconscionable behavior, or harsh or improper conduct, on the part of the Government.
8. If the Ombudsperson determines that it is not necessary to make reference to the Cabinet Records in a Public Report under the *OA*, the Ombudsperson will return the Cabinet Records to the Official within 14 days of giving notice of that determination.
9. If the Ombudsperson proposes to make any reference to Cabinet Records in a Public Report, the Ombudsperson will give notice to the Official and to the Attorney General of the text of proposed publication ("the proposed text"), which notice will contain the following:
- (a) The reasons for the proposed text, having regard to the test in clauses 6 and 7 of this Protocol.
 - (b) The full draft report in which the reference to the Cabinet Records is made.
 - (c) Notice that the Government will have 14 days from the date notification is received by the Official to notify the Ombudsperson in writing as to whether the Government objects to the proposed text, and if such objection is made, the reasons the objection, including, as appropriate, any alternate text that the Government advances in place of the proposed text.
10. If the Government makes an objection under clause 9(c), the Ombudsperson will consider the objection and notify the Government in writing of her decision regarding the proposed final text.
11. If the Ombudsperson accepts the Government's submission and decides to make no reference to Cabinet Records, the Ombudsperson will return the Cabinet Records to the Official along with the notification in clause 10.
12. If the Ombudsperson does not accept the Government's submission, and decides to publish a final text which does not accord with the Government's submission, the Government will have 14 days from the date the Official receives notification under clause 10 to advise the Ombudsperson as to whether the Government intends to proceed with an AG Restriction.

13. If the Government does not give notice to the Ombudsperson under clause 12, the Ombudsperson may publish the Report with the final text.
14. If the Government notifies the Ombudsperson under clause 12 that it intends to proceed with an AG Restriction, then:
 - (a) the Ombudsperson and the Government will, prior to the Government proceeding with an AG Restriction under clause 16 and within the 14 day time period set out in that clause, participate in Confidential Facilitated Discussions.
 - (b) any Confidential Facilitated Discussions will proceed on the understanding that the Confidential Facilitated Discussions are not a negotiation regarding the public interest, as neither Ombudsperson nor the Attorney General may negotiate their prior assessment of the public interest.
 - (c) the purpose of the Confidential Facilitated Discussions will be to ensure that there has been full information and communication between the parties, and a consideration by both parties of all reasonable alternatives, prior to a final decision being made by the Attorney General under section 18.
 - (d) The Ombudsperson may, in her discretion, publish the Report in question in the absence of the disputed text, pending resolution of the discussions regarding the intended AG restriction.
15. Within 5 days after completion of the Confidential Facilitated Discussion, the Attorney General will notify the Ombudsperson of the final decision as to whether the AG Restriction has or has not been exercised.
16. If the Government notifies the Ombudsperson under clause 15 that that the AG Restriction has been exercised, the Ombudsperson may publish the Report in the absence of the text that is the subject of the objection in clause 10, if it has not already been so published under clause 14(d).
17. If the Government notifies the Ombudsperson under clause 15 that the AG Restriction has not been exercised, the Ombudsperson may publish the full text of the report, or any additional text as may be necessary to refer to the Cabinet information previously excluded from a published report.
18. This Protocol does not limit any rights or defences available to the parties in a court of law in the event that an AG Restriction is exercised.
19. This Protocol may be terminated by either party by providing notice of termination to the other and upon such notice being provided, any documents which have been provided pursuant to this Protocol will continue to be governed by this Protocol.

20. Nothing in this Protocol will prevent the issuance of an AG Restriction at any time with respect to a matter under the Ombudsperson Act section 18(1)(a).

Dated: Feb 10, 2011 at Victoria, British Columbia.


Kim Carter
Ombudsperson


Allan Seckel Q.C.
Deputy Minister to the Premier