

March 12, 2018

Mr. Pierre Michel Auger
Chairman, Committee on Institutions
Hôtel du Parlement
1045, rue des Parlementaires, bureau RC.73
Québec (Québec) G1A 1A4

**Subject: Bill 164 – Act respecting access to certain documents held by the Conseil
exécutif or intended for the Conseil exécutif**

Dear Mr. Chairman:

Within the framework of its mandate, the Québec Ombudsman reviews all bills and draft regulations introduced in the National Assembly or published in the *Gazette officielle du Québec*. When it deems necessary, it intervenes under section 27.3 of its constituting act, which empowers it to call the attention of the government or a chief executive officer of a public body to legislative, regulatory or administrative reforms it deems to be in the public interest.

With this in mind, I examined Bill 164, *Act respecting access to certain documents held by the Conseil exécutif or intended for the Conseil exécutif*, introduced by the Minister responsible for Access to Information and the Reform of Democratic Institutions on February 15, 2018. I wish to convey my understanding of the scope of the Bill and to make a few remarks concerning the impact on the exercise of the Québec Ombudsman's mission.

First of all, I want to point out that the Québec Ombudsman recognizes the need to protect the privacy of Cabinet deliberations, a core element of this democratic institution.

However, I am taking the liberty of drawing your attention to a particular aspect of the Bill. The proposed amendment to subparagraph 5 of the first paragraph of section 33 of the *Act respecting access to documents held by public bodies and the Protection of personal information* has the effect of protecting the confidentiality of studies, opinions and recommendations released to the Conseil exécutif concerning a recommendation or request made by one or more ministers, a cabinet committee or a public body, or regarding a document contemplated in section 36 of the above Act.

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This amendment could have a substantial impact on the investigations conducted by the Québec Ombudsman pursuant to the *Act to facilitate the disclosure of wrongdoings relating to public bodies*. Under this Act, the Québec Ombudsman is empowered to investigate wrongdoing relating to a government department or public agency committed or about to be committed by public servants or other persons. Section 8 of this Act allows anyone who discloses a wrongdoing or who cooperates in an investigation or audit to produce documents or information showing that wrongdoing has occurred, despite the restrictions provided for in the *Act respecting access to documents held by public bodies*. The only restriction that applies concerns documents and information protected by section 33 of this Act. The interpretation of the scope of subparagraph 5 of this section could therefore directly affect the Québec Ombudsman's capacity to obtain the information needed for audits and investigations into certain wrongdoings.

Take for instance, a case in which the Québec Ombudsman investigates a conflict of interest situation or a serious breach of ethics and conduct by public servants who study subsidy applications. It should be able to access the studies and notes in support of the recommendation to grant or to refuse to grant the subsidy. If the subsidy application was the subject of a Cabinet decision, certain notes or studies may have been released to Cabinet in support of the Minister's brief or recommendation.

My understanding of the proposed legislative amendment is that subparagraph 5 of the first paragraph of section 33 of the *Act respecting access to documents held by public bodies* pertains to the studies released to the Conseil exécutif by public bodies prepared at its request or concerning a recommendation to Cabinet. This subparagraph would not apply to studies, opinions or notes prepared within a government department or public agency and intended for the Minister responsible, even if this information could possibly support a recommendation or be part of a brief presented to Cabinet by a minister.

My reading of the scope of the proposed amendment would enable access by the Québec Ombudsman to these studies and notes as part of an investigation or audit concerning a wrongdoing committed by a public servant or by any other person, in the stages of studying a file prior to the Cabinet decision.

Any other interpretation of the proposed amendment to subparagraph 5 of the first paragraph of section 33 could hinder exercise of the role conferred on the Québec Ombudsman by the legislator—to contribute to maintaining the integrity of public bodies by shedding light on the wrongdoings committed against them. If the Québec Ombudsman cannot investigate a wrongdoing committed before the Cabinet decision, and on which the decision could have been based, the government risks foregoing insight into the administrative handling of files and sound management of the public purse.

Considering all of the above, it seems important that I share my reading of the proposed amendments to section 33 of the *Act respecting access to documents held by public bodies* introduced in the Bill and their potential impact on the exercise of the Québec Ombudsman's public integrity mandate.

Yours respectfully,

Marie Rinfret
Ombudsperson

c.c.: Ms. Kathleen Weil, Minister responsible for Access to Information and the Reform of Democratic Institutions
Mr. Jean-Marc Fournier, Government House Leader
Mr. Pascal Bérubé, Official Opposition House Leader
Mr. François Bonnardel, Leader of the Second Opposition Group
Ms. Manon Massé, MNA for Sainte-Marie-Saint-Jacques
Mr. Jean-Philippe Marois, Associate Secretary General, Secrétariat à l'accès à l'information et à la réforme des institutions démocratiques
Ms. Carolyne Paquette, Secretary, Committee on Institutions