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OFFICE OF THE INTEGRITY COMMISSIONER

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REPORT

OF

**THE HONOURABLE COULTER A. OSBORNE
INTEGRITY COMMISSIONER**

**RE: THE HONOURABLE GREGORY SORBARA,
MINISTER OF FINANCE**

**TORONTO, ONTARIO
September 23, 2004**

RE: THE HONOURABLE GREGORY SORBARA, MINISTER OF FINANCE

[1] In a complaint made under s. 30 of the *Members' Integrity Act, 1994*, James Flaherty, the member for Whitby–Ajax, has alleged that Gregory Sorbara, Minister of Finance and member for Vaughn–King–Aurora, breached parliamentary convention and thus contravened the *Members' Integrity Act, 1994* by leaking what turned out to be provisions of the Government's May 2004 budget.

[2] In his affidavit providing particulars of his allegations, Mr. Flaherty referred to four instances where matters later included in the budget were disclosed to the media before the budget was released in the Legislature. The four budget leaks to which I refer are:

1. "Budget Includes Health Premiums", by Richard Mackie, in the Globe and Mail newspaper, dated May 15, 2004
2. "Cities to Share Gas Tax Bonanza", by Caroline Mallan and Rob Ferguson in the Toronto Star newspaper, dated May 17, 2004
3. "Liberal Budget to Carry Tax Bite", by Caroline Mallan and Rob Ferguson in the Toronto Star newspaper, dated May 17, 2004
4. "Sorbara Says Inaugural Budget will be Comprehensive and Compassionate", by Gillian Livingstone in Canadian Press, dated May 17, 2004

[3] This complaint requires consideration of the practice of budget secrecy, the principles that underlie it and its scope. I also have to consider whether budget secrecy is parliamentary convention as referred to in the *Members' Integrity Act*. This goes to my jurisdiction to deal with the complaint.

BUDGET SECRECY

[4] It seems to me that it is accepted that budget secrecy (and the related lock-up) is a political practice. Whether budget secrecy can properly be viewed as a parliamentary convention as referred to in the *Members' Integrity Act* is another matter. The scope of the practice or convention is, I think, informed by its purpose. That is to say, how much secrecy is properly

imposed on provisions of a provincial budget is to a large measure determined by the purpose of keeping at least some elements of a budget confidential until the Minister of Finance has delivered his/her budget in the Legislature.

[5] The purpose of budget secrecy is to prevent financial speculation resulting from the disclosure of insider budget information and to avoid loss of revenue from the government's standpoint.

[6] House of Commons Speaker Sauvé referred to the purpose of budget secrecy in much the same way. She said that disclosure of provisions of a budget,

...might have a very negative impact on business or on the stock market [and] might cause some people to receive revenue which they would not otherwise have been able to obtain... [It has] no impact on the privileges of a member. [It] might do harm – irrevocable in some cases – to persons or institutions, but this has nothing to do with privilege. It has to do with the conduct of a Minister in the exercise of his administrative responsibility.

[7] On May 9, 1983, the Speaker of the Ontario Legislature referred to budget secrecy as a “political convention”. He added that “it has nothing to do with parliamentary privilege.” It is clear that allegations that the Finance Minister failed to ensure the secrecy of the budget may be raised on a substantive motion of want of confidence in, or censure of, the Minister. The Speaker went on to say,

The disclosure of information relating to the budget has to do with the conduct of a minister of the crown in the performance of his ministerial duties. Allegations that the Treasurer failed to ensure the secrecy of the budget and thereby permitted a budget leak may only be raised by a substantive motion of want of confidence in, or censure of, the minister.

[8] In my view, given the purpose of budget secrecy, whether it is characterized as a practice or as a convention, its scope is not all encompassing. That is to say there is no practice or convention which would prohibit any disclosure, however trivial, of a budget's contents. In the real world in which we live, there will be occasions where, in the development and discussion of public policy, some contents of a future budget will be disclosed advertently or inadvertently.

[9] Whether the practice of budget secrecy can be elevated to the status of a convention is another matter. Conventions are consistently followed rules that are not enforced in law, that is by the courts. They prescribe ways in which legal powers are exercised, and in some limited circumstances not exercised at all. In a constitutional context, conventions embrace rules which are observed in practice and, although they do not have the force of law, they may have legal effect. The Supreme Court of Canada made this clear in the well known Constitutional Reference Case. Although not directly enforceable in law, conventions may be transformed into law by being included in a statute. This will create a legal obligation where none existed before. The *Members' Integrity Act* provides a useful example of that occurrence. In the *Members' Integrity Act* parliamentary convention is given legal effect through several provisions of the *Members' Integrity Act*. Accordingly, if I were to view budget secrecy as a parliamentary convention I would have to determine whether it is a parliamentary convention as that term is used in the *Members' Integrity Act*.

[10] Parliamentary convention as referred to in the *Members' Integrity Act* is used as a conduct related device to control, and in some cases sanction, Members' conduct. In my view, the adjective "parliamentary" limits the scope of the convention to matters having to do with the Members as parliamentarians. Thus, not all political conventions would properly be considered to be parliamentary conventions for *Members' Integrity Act* purposes. Moreover, to the extent that parliamentary convention may impact on members' conduct in the Legislature, such parliamentary conventions are for the Speaker to consider. They do not engage the *Members' Integrity Act*.

[11] I will return shortly to the subject of parliamentary practices, parliamentary and political conventions. Before doing so, it seems to make sense to determine whether the breaches of budget secrecy alleged by the complainant are sufficiently far from the mainstream to be capable of constituting a breach of parliamentary convention, assuming that budget secrecy is a parliamentary convention.

[12] In his response to Mr. Flaherty's allegations, Mr. Sorbara has noted that governments will frequently provide pre-budget public disclosures that may, or may not, become part of a provincial budget. He submits that this is consistent with the government's legitimate activities in the formation of public policy.

[13] Although budget secrecy is accepted at least as a practice, it is a practice with limitations as I have said. By discussing particular contemplated policy initiatives broadly, or through focus groups, governments may reveal matters that are included in a subsequent budget. For example, as Mr. Sorbara noted, before the May 2001 budget the then Finance Minister was quoted as saying there would be more tax cuts, reliance on public-private partnerships and the sale of publicly owned assets. These were taken as references to the contents of the then undelivered budget. When the budget was tabled, the Finance Minister announced corporate tax cuts, a reliance on certain public-private partnerships, particularly in relation to the completion of the construction of Highway 407 to the east and the sale of some publicly owned assets.

[14] Similarly, May 2001 media reports indicated that "the Tories have made it clear they will increase spending on health and education but clamp down on costs elsewhere". The budget, when delivered, reflected the application of those rather general statements.

[15] A further example of pre-budget release of information that turned up in the budget occurred in June 2002 when government sources were quoted as indicating that increased tobacco taxes would raise the price of cigarettes by five dollars to fifteen dollars a carton. As it turned out, in the budget which followed, the Finance Minister announced an increase in tobacco taxes of five dollars.

[16] In March 2003, media reports indicated that Premier Eves had suggested that the government might restore a set of 2003 tax cuts that it had delayed until 2004. In the budget speech that followed, the Finance Minister announced that corporate tax cuts that had been delayed in the 2003 budget would be restored. In the same budget there was a provision that legislation would be introduced to phase in private school tax credits. This reflected a pre-budget

statement by the Premier that the government would move ahead with tax credits for private schools which had been delayed in the 2002 budget.

[17] The pre-budget disclosures which I have set out above are no more than examples of the disclosure of matters that are being considered for inclusion in a budget. In addition, from time to time an alert media will pick up on issues referred to in government organized focus groups, or in polling. The net result is the same – there is some public disclosure of matters which might, and frequently do, appear later in the budget.

[18] All of this compels the conclusion that budget secrecy is not an absolute concept. It has limitations and those limitations have generally been accepted.

[19] In the circumstances of this complaint, I do not think that it matters whether budget secrecy, however its scope is defined, is viewed as a political practice (or convention), or as a parliamentary convention. I say that because I do not think that the breaches of budget secrecy alleged are sufficiently egregious or far from the mainstream that they are capable of giving rise to a finding of a breach of parliamentary convention as referred to in the *Members' Integrity Act*.

[20] I do not wish to be taken to have concluded that under no circumstances could a breach of budget secrecy give rise to a finding of a contravention of the *Members' Integrity Act* (including its several references to parliamentary convention). I have in mind circumstances where disclosures to a third party of insider budget information before the budget is delivered might lead to either a finding of a breach of parliamentary convention generally or a finding that a Member has breached the insider information provisions of the *Members' Integrity Act* (s.3). These circumstances do not exist here.

[21] I see no merit in the complaint. It is therefore dismissed.

DATED at Toronto this 23rd day of September, 2004.

The Honourable Coulter A. Osborne