Bill 175, the *Safer Ontario Act, 2017*

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Submitted by: Ontario Bar Association

ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

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Introduction

The Ontario Bar Association (the "OBA") appreciates the opportunity to make this submission to the Standing Committee on Justice Policy (the "Committee") in respect of Bill 175, the *Safer Ontario Act, 2017*. The Bill will, among other things, repeal and replace the *Police Services Act* and significantly define the mandates and operations of the police oversight bodies in Ontario. In addition, it will create the new *Missing Persons Act, 2017*, amend the *Coroners Act* to improve Ontario's inquest system, and create a provincial accreditation framework for forensic laboratories.

This submission is organized in two parts. The first part looks at the proposed amendments in Schedules 1 to 5, which deal with the *Police Services Act* and police oversight amendments. The second part focuses on Schedule 7, the *Missing Persons Act, 2017*.

The OBA

Founded in 1907, the OBA is the largest legal advocacy organization in the province, representing approximately 16,000 lawyers, judges, law professors and students. OBA members are on the frontlines of our justice system in no fewer than 40 different sectors and in every region of the province. In addition to providing legal education for its members, the OBA assists legislators with many policy initiatives each year – both in the interest of the profession and in the interest of the public.

This submission has been developed largely by the OBA's Aboriginal Law, Criminal Justice, and Privacy Law sections, and the OBA's Women Lawyers Forum. OBA members participating in this submission include lawyers representing represent a wide range of clients whose rights and interests are engaged by the critical issues at play in Bill 175.

Schedules 1 – 5, the *Police Services Act* and Police Oversight Bodies

Background

The historical, and largely negative, relationship between Indigenous communities and the police is critical context for both the current state of Indigenous-police relations and the development of Bill 175. The systemic and institutional discrimination against Indigenous individuals historically enshrined in legislation has played a large role, and the impact of statutes such as the *Indian Act*, which continues to regulate (among other things) the ability of First Nations to develop community-made by-laws, continues to be felt.

Moreover, the framework governing the policing of Indigenous individuals is extremely complex, involving an overlap of federal jurisdiction under s. 91(24) of the *Constitution Act, 1867* and

provincial jurisdiction under s. 92(14). This overlap in legislative authority, against the backdrop of Indigenous rights of self-governance, has historically contributed to a disconnect at the federal and provincial levels in satisfying legislative and financial obligations to Indigenous individuals and communities, and specifically respecting First Nations policing.

Inconsistent funding practices regarding First Nations policing has been a longstanding, well-documented concern. In an effort to support community-responsive policing in First Nations and Inuit communities, the federal government launched the First Nations Policing Program (FNPP) in 1991. In its operation today, the FNPP is delivered through tripartite policing agreements among the federal government, provincial or territorial governments, and communities, with the federal and provincial/territorial governments providing parallel financial contributions.[1]

In 1996, the FNPP began requiring that First Nations police services meet the standards of the province or territory in which they operate. Typically, such a legislative framework would regulate policing standards and practices in the areas of, among other things, service levels, staffing, training, equipment, facilities, and accountability.[2] Until recently, Ontario has never taken legislative steps to create a framework that would require that policing services provided to First Nations communities fully comply with provincial policing legislation and standards.

The absence of such a framework has significant implications for First Nations policing, including the following:

- As a funding program without a legislative mandate, services provided by First Nations police services can be discontinued at any time.
- As First Nations police are not considered an "essential service," there is no legislative obligation for the province to provide adequate funding for personnel, equipment, or infrastructure.
- When a police service governed by the *Police Services Act* disagrees with its funder (e.g. the municipality) about the level of funding required to maintain services, there is a binding external review mechanism available under the Act. No such provision exists for First Nations police services.
- The mandates of the police oversight bodies in exercising the majority of their functions do not extend to First Nations police services.[3]

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[1] Public Safety Canada, *2014-2015 Evaluation of the First Nations Policing Program: Final Report* (2016), s. 2.3.1.
[2] Office of the Auditor General of Canada, *2014 Spring Report*, c. 5 – First Nations Policing Program – Public Safety Canada (2014), para. 5.21.
[3] Office of the Chief Coroner, *Recommendations Concerning the Coroner's Inquest into the Deaths of Ricardo Wesley and Jamie Goodwin* (2009), p. 6; Honourable Michael H. Tulloch, *Report of the Independent Police Oversight Review* (2017), para. 35.

In the absence of mandatory legislative standards respecting First Nations policing, any funding issues must be resolved among the signatories to the tripartite policing agreement. The result has been chronic underfunding of First Nations police services, and unsafe conditions for police service employees and the communities they serve. In addition, the exclusion of First Nations police services from the oversight bodies' mandate has been viewed as discriminatory and marginalizing of First Nations communities. Collectively, these gaps and the need for a provincial framework have been highlighted in a number of significant reports and inquiries.[4]

Despite these calls, it was not until 2015 that the Ministry of Community Safety and Correctional Services announced that it would be launching consultations on the Strategy for a Safer Ontario, which would result in significant pieces of Bill 175. The Strategy aimed to comprehensively update the *Police Services Act*, including through the development of a provincial framework for First Nations policing to ensure equitable and culturally responsive policing for First Nations communities.

Also in 2015, Andrew Loku was shot to death in his home by a member of the Toronto Police Service. His death, and the police-involved deaths of other men in the Toronto area during the same period, resulted in days of protest by community activists. In 2016, the Special Investigations Unit cleared the police of wrongdoing in Loku's death, renewing protests regarding police and police oversight, and the Ontario government appointed the Honourable Michael H. Tulloch to lead an Independent Police Oversight Review.

Justice Tulloch's extensive mandate required him to examine the three police oversight bodies, and make recommendations with respect to four key areas:

- enhancing the transparency and accountability of the oversight bodies;
- ensuring that they are effective and have clear mandates;
- reducing overlap and inefficiencies between them; and
- enhancing their cultural competency in relation to their interactions with Indigenous Peoples.

Justice Tulloch's extensive report, which was released in the spring of 2017, made 129 recommendations in total. In response, the provincial government indicated that it would be acting

[4] See, among others, the Honourable Sidney B. Linden, *Report of the Ipperwash Inquiry* (2007); Office of the Chief Coroner, *Recommendations Concerning the Coroner's Inquest into the Deaths of Ricardo Wesley and Jamie Goodwin* (2009); Office of the Auditor General of Canada, *2014 Spring Report*, c. 5 – First Nations Policing Program – Public Safety Canada (2014); Office of the Provincial Advocate for Children and Youth, *Feathers of Hope: Justice and Juries – A First Nations Youth Action Plan for Justice* (2016); Honourable Michael H. Tulloch, *Report of the Independent Police Oversight Review* (2017).

on the large majority of the recommendations directed towards the Ministry of the Attorney General. These have also come forward as significant pieces of Bill 175.

Comments Relating to First Nations Policing

Against this backdrop, Bill 175 proposes significant changes to the *Police Services Act* relating to the operation of Indigenous policing in Indigenous communities by, among other things, giving First Nations the ability to create their own police services boards under the *Police Services Act*. Though not required, those First Nations that do choose to opt in will be subject to the provincial standards applicable to all other police services in the province, as well as the jurisdiction of the police oversight mechanisms.

Community-Based Consultation

As noted above, many of these changes in Bill 175 flow from the province's Strategy for a Safer Ontario, which launched in 2015. While we understand that a range of stakeholders, including Indigenous governance organizations, were consulted as part of the Strategy, it is not clear that individual Indigenous communities were consulted with respect to potential changes to Indigenous policing in their communities, or that there was an opportunity for Indigenous community members, including people who are employed by Indigenous policing services, to ask questions of the Ministry and/or Ministry representatives regarding the content of the changes.

It is critical that the Ministry meaningfully and directly engage in consultation with Indigenous communities in moving ahead with changes to Indigenous policing. While dialogue with broad-based Indigenous governance organizations is important, perspectives within and between Indigenous communities regarding policing and police services are varied, as they are on any issue. Moreover, every Indigenous community will have different capacity, including funding capacity, to immediately assume the legislative responsibilities inherent in Bill 175. The Bill will add administrative burdens on Indigenous policing services that may not currently have access to the funding necessary to ensure adequate and effective policing in their communities.

As a result, we expect that the Ministry will engage directly with individual communities in preparation for Bill 175's implementation to ensure that the supports required for community-based policing, including financial supports, are available in a way that recognizes and sustains the unique role played by Indigenous officers in Indigenous communities.

Application to First Nations

Section 32 of Schedule 1 proposes to allow a band council of a First Nation to request that the Minister constitute a First Nations police board to provide policing in a First Nations territory or other specified area. For the purposes of Schedule 1, "First Nation" includes a band as defined under the federal *Indian Act*. However, it should be noted that not all Indigenous communities with their own policing services in Ontario fall under the *Indian Act* (such as, for example, the Akwesasne

Mohawk Police Service.) Limiting Indigenous communities in this way effectively may create jurisdictional uncertainty which has the potential to displace governmental responsibility.

Additional Comments

We have the following additional comments regarding Schedule 1 to Bill 175:

- Agreements made under ss. 27 and 76 of Schedule 1 (allowing for municipalities and the Ontario Provincial Police (O.P.P.), respectively, to take on policing responsibility within a First Nations territory with the agreement of the First Nation) should be explicitly renewable and rescindable.
- With respect to s. 33(4) of Schedule 1, it is recommended that shareholders in any for-profit entity that provides policing services be prohibited from serving as members of a police service board.
- Sections 32(11) and 77(10) of Schedule 1 permit the Minister to revoke or amend regulations pertaining to First Nations boards and First Nations O.P.P. boards where, among other things, there has been a "material change" in the circumstances on which the regulation was based or the amendment is "editorial" in nature. It is recommended that both these terms be define for the purposes of these provisions to ensure predictability and consistency moving forward.

Comments Relating to Police Oversight Bodies

Bill 175 also proposes significant changes to the three police oversight bodies, based upon Justice Tulloch's recommendations. Police oversight is a critical public function that demands transparency and accountability, and it is essential that these bodies have clear and effective mandates that function to promote the administration of justice.

We appreciate Justice Tulloch's hard work and thoughtful outreach in leading the Independent Police Oversight Review and developing his recommendations. We further applaud the Ministry's recognition that these are significant issues in its commitment to implement a number of Justice Tulloch's recommendations. However, there are a few ways in which the recommendations require further implementation if Justice Tulloch's work is to be given full effect, and we hope these will be considered moving forward.

Importance of Cultural Understanding

Justice Tulloch's mandate included reviewing cultural competency[5] in the policing-oversight bodies, specifically in relation to their interactions with Indigenous peoples, and we appreciate that he

[5] Although Justice Tulloch's mandate specifically referred to "cultural competence" and the Report makes a number of references to the need for enhanced "cultural competency," we understand that these concepts

extensively consulted with Indigenous communities to ensure that his review was informed by Indigenous perspectives.

As Justice Tulloch noted, it is clear that the oversight bodies require the development of significant cultural competency skills in their interactions with Indigenous individuals. The police oversight system is foreign to Indigenous individuals, as it is to many members of the public, and the oversight bodies have repeatedly failed to engage with Indigenous communities in a culturally-sensitive way.

To improve the relationship between Indigenous communities and police oversight mechanisms, Justice Tulloch recommended, among other things, that

- the oversight bodies develop and deliver, in partnership with Indigenous persons and communities, mandatory Indigenous cultural competency training for their staff (recommendation 10.1);
- the oversight bodies increase outreach to Indigenous communities and establish meaningful and equitable partnerships with Indigenous organizations (recommendation 10.2);
- the oversight bodies develop an ongoing audit process to assess the implementation and effectiveness of cultural competency and institutional change (recommendation 10.5); and
- consideration be given to expanding the mandates of the oversight bodies to include First Nations policing, on an opt-in basis (recommendation 10.6).

In contrast, should Bill 175 pass, the Directors of the Ontario Special Investigations Unit and the Ontario Policing Complaints Agency will be required, in consultation with persons representing the diversity of Ontario, to provide training for employees that promotes recognition of and respect for,

- the diverse, multiracial and multicultural character of Ontario society, and
- the rights and cultures of First Nation, Inuit, and Métis Peoples.[6]

Unfortunately, the lack of legislative basis for many of Justice Tulloch's recommendations around cultural competency is a missed opportunity. In particular, no provision formally articulates a role for the Indigenous advisory groups envisioned by Justice Tulloch to provide ongoing advice on cultural competency for the oversight bodies and outreach to Indigenous communities.

As indicated in Justice Tulloch's report, cultural competency "goes beyond simply training staff," though this is critically important. In particular, we note that Bill 175 contemplates that the cultural competency training must conform with any requirements prescribed by the Minister and is to be informed by "consultation with such persons who represent the diversity of Ontario" as

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more broadly refer to cultural *understanding*, rather than a more narrow conception of cultural competency in training (as in the workplace context, for example).

[6] See Schedule 2, ss. 6(6)(b) and 44(d)(i), and Schedule 4, s. 5(6)(b).

considered appropriate by the OSIU Director or the Complaints Director, as the case may be. It would be appropriate for an advisory body or council to have a primary role in advising the Minister in determining which persons represent "the diversity of Ontario" and in the development of diversity training for employees.

It is clear that the operation of the current policing oversight bodies is far removed from Indigenous communities' concerns and realities, and that these challenges will not be resolved with the addition of an "Indigenous" voice to the table. We hope the Ministry will look closely at Justice Tulloch's recommendations regarding the need for meaningful and equitable partnerships between Indigenous communities and police oversight bodies.

Schedule 7, the *Missing Persons Act, 2017*

The purpose of Schedule 7, the proposed *Missing Persons Act, 2017* ("the proposed Act"), is to make timely and effective tools available to police to assist with locating missing persons. The development of this legislation has been recommended by a number of reports, inquests, and inquiries, including *Forsaken: The Report of the Missing Women Commission of Inquiry*,[7] and flows from commitments made in Ontario's Long-Term Strategy to End Violence Against Indigenous Women.[8] In 2014, a *Uniform Missing Persons Act* was drafted by the Uniform Law Conference of Canada in an effort to support the development of provincial legislation, which already exists in at least six other Canadian provinces.

As recognized in the *Forsaken Report*, the *Uniform Missing Persons Act*, and the Preamble to the proposed Act, it is critically important to support the availability of timely and effective measures to assist in locating missing persons while at the same time respecting, to the greatest extent possible, individuals' privacy interests and agency (that is, their ability to determine what should happen with their own personal information). In trying to achieve a balance between these two imperatives, the proposed Act grants extensive production powers over a broad range of highly sensitive personal information while building in some protections to safeguard the privacy of individuals who are the subjects of that information.

Members of the OBA were pleased to be invited by the Ministry of Community Safety and Correctional Services to provide thoughts on the development of the proposed Act in the spring of 2017. In part, that discussion brought together ways in which the risk of misuse of the legislation could be minimized, such as by ensuring meaningful accountability and oversight of the regime,

[7] The Honourable Wally T. Oppal, *Forsaken: The Report of the Missing Women Commission of Inquiry* (2012).
[8] Ontario, Walking Together: Ontario's Long-Term Strategy to End Violence Against Indigenous Women (2016).

clarity in drafting of key terms and phrases, and careful examination of the appropriateness of the urgent access provisions.

With the benefit of those earlier discussions and having now had the opportunity to carefully review the text of the proposed Act, we believe that the Act can be further refined in order to strengthen some of the privacy protections afforded to individuals in the context of missing persons investigations. As recognized by the proposed Act, the circumstances around each person's absence are unique and there are sometimes important reasons why a person has chosen to cut off contact with friends or family, such as to escape abuse or violence. The recommendations below seek to recognize this reality while suggesting amendments that will help further the goals and effectiveness of the proposed Act.

Production Orders and Demands

Section 4(1) of the proposed Act sets out the power of a police officer to seek a production order for records pertaining to a missing person. The extensive list of records that may be the subject of a production order is set out in s. 4(2).

Per s. 4(3), in considering whether to make an order, the provincial judge or justice of the peace must be of the opinion that the public interest in locating the missing person outweighs the privacy interest of any persons whose information may be contained in the records. In addition, s. 4(4) requires the justice to consider any information that suggests that the missing person may not wish to be located, including information suggesting that "the missing person has left or is attempting to leave a violent or abusive situation." This same factor must be taken into consideration when an officer is determining whether to make an urgent demand for production under s. 5(3).

As noted above, the main issue in examining the provisions governing production orders under the proposed Act is whether the test for production appropriately balances the urgent need to locate missing persons with individuals' privacy interests. In particular, ss. 4(4) and 5(3) are designed to minimize the risk that the legislation will be misused by, for example, an estranged or abusive spouse.

However, it is unclear what factors or evidence will be considered and relied upon in making a determination that a person "has left or is attempting to leave a violent or abusive situation." Protection for individuals leaving or trying to leave a violent or abusive situation warrants a heightened safety analysis, but the relevant signs may not always be readily apparent, particularly in situations of emotional or psychological abuse. Factors for consideration could include, for example, outstanding court proceedings or records (such as restraining orders or custody and access proceedings) and testimonies or affidavits from family, friends, social workers, or others. Providing further guidance to decision-makers in this respect would strengthen the protection of this provision. It is recommended that these factors should be made clear, potentially by regulation, following consultation with Indigenous, feminist, multi-cultural, inter-faith, and other relevant groups and stakeholders.

With respect to urgent demands for production, the test to be met is set out in s. 5(1), which requires an offer to be satisfied that there are reasonable grounds to believe that

- the records are in the custody or under the control of a person;
- the records will assist in locating the missing person; and
- in the time required to obtain a production order in accordance with s. 4, the missing person may be seriously harmed or the records may be destroyed.

There is a requirement in s. 5(6) compelling compliance when a police officer makes an urgent demand for information. In terms of safeguards, each officer is required to report their reasons for making an urgent demand (s. 5(8)), and it is required for the police force to annually report the number of urgent demands made (s. 8). However, there are no penalties that apply in instances where there was enough time to seek an order under s. 4, raising the potential for the misuse of the urgent demand provision.

Issues Relating to Use, Retention, and Destruction of Records

Use and Retention

As set out in s. 4(2) of the proposed Act, the types of records that may be ordered to be produced is broad, including records containing contact information or other identifying information, phone records, employment and personal health information, travel and accommodation information, and financial information. An order under the proposed Act may require the production of records relating to the missing person or any other person.

The threshold to be met in requesting production of information in the context of the proposed Act requires belief on reasonable grounds that the records will assist in locating a missing person (s. 4(1)(b)). Similarly, as noted above, s. 5(1) empowers a police service member to obtain the same breadth of information without a judicial order, provided he or she is satisfied on reasonable grounds that

- the records are in the custody or control of the person being asked for them;
- the records will assist in locating the missing person; and
- in the time required to obtain an order, the missing person may be seriously harmed or the records may be destroyed.

Finally, s. 6(1) of the proposed Act permits the authorization of a warrant allowing police to enter onto a premises if there are reasonable grounds to believe that a missing person may be located there and the entry is necessary to ensure the safety of the missing.

The broad and personal nature of the information that may be obtained pursuant to these provisions calls out for appropriate guidance on how that information may be used. As an example, one of the key elements of the *Uniform Missing Persons Act* is the inclusion of guidance on privacy limitations regarding the use, retention, disclosure, and destruction of any records produced in the

context of a missing persons investigation. Under that Act, a police service may only use information and records

- for locating a missing person or a use consistent with that purpose;
- when required by law;
- if they have been disclosed to another law enforcement agency in Canada or another country, but only to the extent necessary to further the investigation into the missing person; or
- if the subject of the information or records has consented to the disclosure.

In contrast, the proposed Act does not contain any safeguards regarding the use of the information and, in particular, contains no restrictions on whether the information can be used for purposes other than a missing persons investigation. While s. 2(1) states that the powers under the proposed Act only apply in the absence of a criminal investigation, this provision does not address permissions or restrictions on the subsequent use of records obtained by police under the Act.

This lack of guidance is particularly significant in considering situations where the information produced in the context of a missing persons investigation leads to a subsequent criminal investigation, where a more demanding set of facts is generally required to be proven in order to obtain a production order. For example, a missing persons investigation regarding a victim of human trafficking may turn up evidence of the missing person's involvement in criminal activity, such as involvement in the drug or sex trade.

The potential for information produced in the context of a missing persons investigation to be used in a subsequent criminal proceeding could be highly prejudicial to the missing person or other persons, and could conceivably have a chilling effect on reporting missing persons, thereby defeating the purpose of the legislation. For example, as Justice Tulloch noted in the *Report of the Independent Police Oversight Review*, Indigenous individuals are already over-criminalized and mistrusting of the police:

> The systemic under- and over-policing of Indigenous peoples historically and today has caused a deep sense of mistrust and stigmatization in Indigenous communities. The overrepresentation of Indigenous peoples in the criminal justice system, both as victims and offenders, has further strained the already damaged relationship between Indigenous peoples and the police. The treatment of Indigenous peoples by the police has contributed to a sense of distrust and estrangement from the police and criminal justice system as a whole.[9]

[9] *Report of the Independent Police Oversight Review*, c. 10.210, para. 23.

In this context, and in combination with broad police powers to obtain and use personal information, it is possible that some individuals will choose not to report a missing person to police at all for fear of further repercussions.

It is vital that the proposed Act include specific restrictions on the use of the information collected pursuant to powers authorizes under the Act. In particular, the proposed Act should state that any records or information obtained under the s. 4 production order process, the s. 5 urgent request process, and the s. 6 search warrant process are "only for use in locating and confirming the safety of missing persons."

There is a similar lack of guidance in the proposed Act with respect to what is to happen to the records once the missing person is located or the file is otherwise closed. Are the records to be destroyed? Are they to be returned to the missing person, if possible (or the individual who is the subject of the records, if not the missing person)? Will the records be kept on file, and if so, for how long? Again, in order to properly safeguard the information produced in the context of a missing persons investigation, the proposed Act should provide guidance in this respect.

Disclosure

Section 7 of the proposed Act regulates the disclosure of information regarding the missing person, both to the public and to family, friends, and acquaintances of the missing person. In particular, s. 7(4) prohibits a police service member from disclosing a missing person's personal information to facilitate contact between the missing person and the person's family, friends, or acquaintances except with the person's consent.

However, an exception is set out in s. 7(5), which permits a police service member to facilitate such contact where he or she "has reasonable grounds to believe that a missing person is incapable." "Incapable" is defined in s. 7(9) as "unable to understand the information that is relevant to deciding whether to consent to the disclosure of the missing person's personal information and to appreciate the reasonably foreseeable consequences of giving or withholding that consent."

A plain reading of this provision suggests that it will apply in situations where a missing person is temporarily unable to consent to the disclosure – for example, due to the influence of drugs or alcohol. There is a legitimate question about whether disclosure of the missing person's personal information to their spouse, family, and friends should be permitted in these circumstances, or whether the person should be afforded the opportunity to provide or withhold consent once they regain capacity. In light of the principles that the circumstances surrounding each person's absence are unique and that, per s. 7(4), individuals should have the opportunity to consent – or not, as the case may be – the latter approach (i.e. the person who may temporarily lack capacity should be given a chance to consent after regaining capacity) should be incorporated.

Finally, we note the restrictions that will be placed on the disclosure of non-conviction information in the context of vulnerable sector checks under the *Police Records Checks Reform Act*, when this Act

is ultimately proclaimed in force. As a result, we expect that any information obtained by the police in the course of a missing persons investigation will not be disclosable as part of a police record check.

Records Pertaining to Third Parties

Records obtainable under the s. 4 production order process or the s. 5 urgent request process may pertain not only to the missing person but also to "other persons." In contrast, the *Uniform Missing Persons Act* has a much more circumscribed production order power: the production order generally only applies to the records of missing persons, and third party records may only be produced where the missing person is a minor or a vulnerable person and the third party "may be accompanying the missing person."

In the proposed Act, no limits are placed on the s. 4 production order power as it relates to third parties. It is recommended that the proposed Act adopt the more limited application of the production order and urgent request powers to third parties, as set out in the *Uniform Missing Persons Act*.

In the alternative, two specific amendments are recommended. First, s. 4 should be amended to add a provision that is equivalent to s. 5(10), which requires the police to provide notice to the person whose information has been produced to the police pursuant to a production order. In the absence of this requirement, there is no ability for a third party to seek a remedy if the production order power is abused.

Second, in seeking a production order under s. 4, there should be an obligation on the officer to disclose to the justice the existence of any known third parties whose privacy interests may be affected by the order. For example, if the officer is aware that a bank account is jointly held with a spouse, he or she should be required to disclose this fact to the justice so that the justice can accurately weigh the privacy interest against the public interest in locating the missing person.

Interaction with FIPPA and MFIPPA

Finally, the *Freedom of Information an Protection of Privacy Act* (FIPPA) and the *Municipal Freedom of Information an Protection of Privacy Act* (MFIPPA) together set up a framework for the use, retention, disclosure, and destruction of information (other than personal health information) held by government agencies and public bodies. Unless specifically indicated otherwise, the confidentiality provisions of FIPPA and MFIPPA prevail over those in other Acts.[10]

There is no indication in the proposed Act about whether the powers it authorizes respecting the production of records are meant to override the protections afforded by FIPPA and MFIPPA. It is possible that this lack of clarity could affect the ability to obtain the records under the proposed Act

[10] See in particular s. 67 of FIPPA and s. 53 of MFIPPA.

that are held by a government agency or public body covered by FIPPA or MFIPPA. Specifically, s. 42(1) of FIPPA and s. 32 of MFIPPA prohibit these organizations from disclosing personal information except, among other things,

- in accordance with the provisions of FIPPA or MFIPPA;
- where disclosure is to an institution or a law enforcement agency in Canada to aid an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result; or
- in compelling circumstances affecting the health or safety of an individual if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates.

Moreover, it is unclear whether the exemption allowing for disclosure in instances of "compelling public interest" (s. 23 of FIPPA; s. 16 of MFIPPA) would apply to a missing persons investigation. For certainty, the proposed Act should clarify whether its provisions are meant to override the provision of FIPPA and MFIPPA and, if so, provide for accompanying amendments to ss. 67(2) and 53(2) of FIPPA and MFIPPA, respectively.

Conclusion

The OBA appreciates the opportunity to provide these comments. While we commend the attention the Legislature has provided to these matters, in our view the introduction of Bill 175 represents a starting point, rather than a finish line. We look forward to engaging with the Ministry and other stakeholders as this important work moves forward.