

MITCHELMORE REPORT

November 13, 2019



Commissioner for Legislative Standards

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EXECUTIVE SUMMARY

This report arises out of a referral by the Speaker of the House of Assembly pursuant to s.58 (10) of the **House of Assembly Accountability, Integrity and Administration Act** of two reports prepared by the Citizens' Representative that found violations of the Code of Conduct by Minister Christopher Mitchelmore that recommended corrective action.

As indicated in this report, my role in this matter was to review the reports provided by the Citizens' Representative and determine what appropriate action is necessary in the circumstances. This was not an appeal or an investigation into the findings and conclusions of the Citizens' Representative, as that entity has express statutory jurisdiction in Part VI of the Act to make findings regarding a Code of Conduct violation.

A review of the reports provided by the Citizens' Representative demonstrates that there appears to have been confusion on the process that was followed in the hiring of Ms. Carla Foote at the Rooms Corporation in October 2018. The Minister was of the view that it was a lateral transfer in government, but according to the Clerk of the Executive Council it was not a lateral transfer, but a contractual hire. The Citizens' Representative concluded that the employment contract of Ms. Foote was not in accordance with the **Public Service Commission Act** as the contract was of unlimited duration and not for a specific term, and that if Ms. Foote was going to be transferred to the Rooms a publicly available Order-In-Council was required.

As a Minister of the Crown, Minister Mitchelmore bears responsibility for his actions and his participation in the authorization of the hiring of Ms. Foote in a manner that the Citizens' Representative determined was not in compliance with hiring practices which also resulted in the Board of Directors of the Rooms having to amend its organizational structure.

In light of the findings by the Citizens' Representative of a violation of the code of conduct it is my recommendation to the legislature that Minister Mitchelmore be reprimanded to ensure that Minister's act diligently in the future when they are involved in matters which may impact the public purse and governance of crown boards and/or agencies.

INTRODUCTION

On June 11, 2019 the Citizens' Representative, Bradley J. Moss, issued a "Report of the Citizens' Representative In the Matter of a Public Interest disclosure Made Under Part VI of the **House of Assembly Accountability, Integrity, and Administration Act**" (Copy attached hereto as Schedule 1). In this report the Citizens' Representative concluded that Minister Mitchelmore grossly mismanaged his obligations with respect to the Code of Conduct given his involvement in the appointment of Ms. Carla Foote to the Rooms and the setting, or permitting to be set, her salary at \$132,000.00. Having identified wrongdoing the Citizen's Representative recommended that corrective action be taken. This report was referred to me by the Speaker of the House of Assembly for corrective action on June 13, 2019.

On July 29, 2019, after receiving additional submissions from the Clerk of the Executive Council, Ms. Elizabeth Day, and Minister Mitchelmore's legal counsel, the Citizens' Representative, issued a Supplemental Public Interest Disclosure Report (the "Supplemental Report") (Copy attached hereto as Schedule 2). The Supplemental Report did not change the recommendations and findings of the June 11, 2019 report and reiterated a call for review by the Commissioner of Legislative Standards. This report was referred to me by the Speaker of the House of Assembly on August 2, 2019.

LEGISLATIVE OVERVIEW

The **House of Assembly Accountability, Integrity and Administration Act**, R.S.N.L., 2007 c. H-10.1 arose out of recommendations from former Chief Justice Green in his report "Rebuilding Confidence – Report of the Review Commission on Constituency Allowances and Related Matters." (the "Green Report") In his report, Justice Green examined the issue of Whistleblower legislation and recommended draft legislation for consideration by the House of Assembly.

In commenting upon the form in which whistleblower legislation would take in the province Justice Green highlighted the importance of the statutory independence of the investigator and stated the following at page 5-48:

In the area of publicly traded corporations, either an independent member of the board of directors or an independent firm often monitors whistle-blowing policy. In the public sector, the monitor is often a statutory officer specially appointed for the purpose who, by virtue of the position, is regarded as independent and not subject to influence by the organization being investigated.

Justice Green continued in his report at page 5-49 to discuss who would be responsible for whistleblower investigations in Newfoundland and Labrador:

The whistleblower policy I am recommending will only apply to the legislative branch. To recommend application throughout government would be outside my mandate. Since it would be inappropriate and not cost-effective to recommend that a new statutory office be created to perform the investigative and monitoring function safely within the legislative branch, and assuming that the policy will not expand beyond its present size, I believe the Citizens' Representative should be named as the person to whom a disclosure could be made and who would conduct an investigation.

Part VI of the **House of Assembly Accountability, Integrity and Administration Act**, R.S.N.L., 2007 c. H-10.1 is entitled “Public Interest Disclosure” and sections 54 – 63 govern the public interest disclosure process in this jurisdiction. Pursuant to s.54 (c) in accordance with the recommendation of Justice Green the term “investigator” means the citizens’ representative appointed under the **Citizens’ Representative Act**.

Section 54(e) defines wrongdoing as follows:

54(e) “wrongdoing”, with respect to a member, the speaker, an officer of the House of Assembly and a person employed in the House of Assembly service and the statutory offices, means

- (i) an act or omission constituting an offence under this Act,**
- (ii) gross mismanagement, including of public money under the stewardship of the commission, in violation or suspected violation of a code of conduct,**
- (iii) failure to disclose information required to be disclosed under this Act, or**
- (iv) knowingly directing or counseling a person to commit a wrongdoing described in subparagraphs (i) to (iii).**

(2) Notwithstanding paragraph (1)(c), where a disclosure relates to the citizens’ representative, the commissioner shall be the investigator for the purposes of this Part.

Section 58 of the Act sets out the investigatory process and reads as follows:

58. (1) The investigator shall carry out investigations of matters related to allegations in a disclosure made under this Part.

(2) Upon receipt of a referral the investigator shall, within 5 days, acknowledge to the person making the disclosure that the referral has been received.

(3) The investigation of an allegation made in a disclosure shall be conducted as informally and expeditiously as possible.

(4) The investigator shall ensure that the right to procedural fairness of all persons involved in an investigation is respected, including a person making a disclosure, witnesses and a person alleged to be responsible for wrongdoings.

(5) An investigator is not required to investigate a disclosure and may cease an investigation where he or she is of the opinion that

(a) the disclosure reveals allegations that are frivolous or vexatious or the disclosure has not been made in good faith;

(b) the disclosure does not provide adequate particulars about the alleged wrongdoing as required under subsection 55 (2); and

(c) there is another valid reason for not investigating the disclosure.

(6) Where, during an investigation, the investigator has reason to believe that another wrongdoing has been committed, he or she may investigate that wrongdoing in accordance with this Part.

(7) Upon completing an investigation, an investigator shall report, in writing, to the clerk and the speaker on his or her findings and recommendations about the disclosure and the wrongdoing.

(8) Where the matter being investigated involves the clerk, the investigator shall give a copy of the report to the speaker.

(9) Where the matter being investigated involves the speaker, the investigator shall give a copy of the report to the chairperson of the audit committee.

(10) The speaker, or the chairperson of the audit committee shall, if the report recommends corrective action,

(a) refer the report to the auditor general, the Attorney General, the Minister of Finance or other appropriate official to take appropriate action; or

(b) refer the report to the commission.

Upon completing his investigation, the Citizens' Representative provided his report to the speaker pursuant to s.58 (7) and stated as follows:

It is our considered opinion that the correct procedure to follow in this matter is for the Speaker to contemplate if there are reasonable grounds to believe a member is in contravention of the code of conduct adopted under subsection 35(1) of the Act, and if so, refer the matter to the Commissioner of Legislative Standards for consideration as the "appropriate official to take appropriate action" as anticipated by subsection 10(a) of the Act."

THE JUNE 11, 2019 CITIZEN'S REPRESENTATIVE REPORT

The Citizens' Representative indicates in his report that over the course of his investigation nine witnesses were interviewed. These witnesses included

- a. the former CEO of the Rooms, Mr. Dean Brinton;
- b. the deputy minister of Tourism, Culture, Industry and Innovation, ("TCII") Mr. Ted Lomond;
- c. the assistant deputy minister of TCII;
- d. the Honourable Christopher Mitchelmore, the Minister of TCII;
- e. the executive assistant of Mr. Ted Lomond;
- f. the executive assistant of Dean Brinton;

g. The Executive Committee of the Board including, Ms. Margaret Allen, the Chairperson of the Board of Directors of the Rooms, Mr. Earl Ludlow, the Vice-Chairperson of the Board of Directors of the Rooms, Ms. Katherine Hickey, the Chairperson of the Governance Committee of the Board of Directors of the Rooms;

There were five allegations investigated by the Citizens' Representative. However, only allegations 1 and 3 resulted in findings that Minister Mitchelmore breached the Code of Conduct. For the sake of completeness, I am repeating below the findings of the Citizens' Representative in relation to Allegations 1 and 3:

Allegation #1

Commencing in March 2018 and continuing until October 2018, Minister Mitchelmore directed staff of the Rooms Corporation ("the Rooms") to hire Ms. Carla Foote as Executive Director of Marketing and Development without competition or a position description, in violation of generally accepted human resource practices, including the application of the merit principle to hiring within the Public Service.

Uncontradicted evidence establishes the following facts:

- There was extensive interest in the recruitment for the vacant Director of Marketing and Development position in 2016-2017. Seventy-seven applicants applied; twenty-one with Master's degrees and considerable evidence in the marketing field. Three were attractive enough to be shortlisted prior to the competition being cancelled.

- The CEO, in June 2018, was able to recruit, for a nine-month contract, a candidate with a degree and significant marketing and development experience. That person's contract was revoked at the direction of Minister Mitchelmore (the context for which is discussed later).

- During 2018, the Board of Directors was engaging in an organizational review in contemplation of the proclamation of a new Rooms Act. Its proposed organizational structure was presented and adopted at a Board of Directors meeting held on September 21, 2018. That structure contemplated a Director of Marketing and Development with a salary scale of HL24. One of the restricting principles adopted by the Board was that The Rooms would work with the Staffing Division of the Human Resource Secretariat to conduct a merit-based recruitment and selection process when staffing the organizational structure (Appendix G, page 5).

- After the Board meeting on September 21, 2018, Dean Brinton received a call from Minister Mitchelmore and his Deputy informing him that Carla Foote would be filling the position of Executive Director of Marketing and Development, and her salary would be comparable to that of her previous position, \$132,000.00.

- Minister Mitchelmore has consistently maintained in the media, the House of Assembly, and in an interview with us, that Ms. Foote was the best qualified for the position and that her move was a lateral transfer consistent with similar transfers at the executive level within the public service.

- The direction from Minister Mitchelmore to the Board and the CEO necessitated a second Board meeting to amend the organizational structure that had only been approved at the September 21, 2018, meeting and to confirm Ms. Foote's position would be on an executive level. That meeting took place by teleconference on September 27, 2018. There was no evidentiary basis for the Board to elevate the position from "director" to "executive director" between September 21 and September 27, 2018, but for the intervention of the Minister.

- Dean Brinton and the Executive Committee of the Board perceived Minister Mitchelmore's direction to hire Ms. Foote as a direct order. Dean Brinton signed Ms. Foote's contract and both he and the Minister had signed a Request for Staffing Action Form. That Form was not in compliance with explicit Human Resource Secretariat instructions, in that the section dedicated to outlining the rationale for staffing was not completed.

- Ms. Foote commenced employment at the Rooms on October 1, 2018, as Executive Director of Marketing and Development.

- Ms. Foote is the daughter of a former federal Liberal cabinet minister and worked for the provincial Liberal party when it was in opposition.

Minister Mitchelmore has maintained that Ms. Foote was the best qualified candidate for the position and her move was a lateral one, consistent with others within the public service. The validity of each of these assertions must be assessed against the evidence, legislation, best principles for recruitment, and past practice within the public service.

Was Ms. Foote the best qualified person for the position? During his interview, Minister Mitchelmore did not provide detailed evidence as to how the decision to place Ms. Foote in the Executive Director position was made. No one has provided us with a job description for the Executive Director position or a resume of Ms. Foote's qualifications. We have not been presented with any evidence that other candidates were considered. It is clear that as late as September 21, 2018, the Board of Directors anticipated that the Rooms would conduct a merit-based recruitment and selection process when staffing the organizational structure. No such recruitment occurred for the Executive Director of Marketing and Development. To suggest that Ms. Foote was the best qualified person for this position is to imply that some sort of comparison had been made of the credentials between Ms. Foote and other candidates. If the position had not been reclassified to "executive director", a Public Service competition would have ensued. The Rooms is subject to the Public Service Commission Act and the Executive Director of Marketing and Development recruitment was exempt from the aspects of the Act because generally, positions paid under the executives pay plan are exempt from Public Service Commission competitions.

Was Ms. Foote's employment at the Rooms a lateral transfer within the executive of government, similar to many others that occur from time to time? The first thing to note is that up until September 21, 2018, the Board of Directors had not contemplated that the Director of Marketing would hold an executive position. The Board did create two executive positions on September 27, 2018, but only after the intervention of Minister Mitchelmore. But for his intervention, we can assume that the Board would have filled the position at a director level.

The Executive Council Act gives the premier and cabinet the ability to appoint deputy ministers and assistant deputy ministers within government departments. The Rooms is a Crown Corporation, however, operating under its own legislation. Section 10 of the Rooms Corporation Act gives the Chief Executive Officer the responsibility for, among other things, human resources. As outlined in section 8 of that Act, the responsibility over human resources operates under the Board's obligation to implement the policies, systems and programs approved and directed by the Minister and the Human Resource Secretariat. We take this to mean that the Chief Executive Officer can hire, but must adhere to the Human Resource Secretariat policies like those around the Request for Staffing Action Form that are attached hereto as Appendix J. That policy contemplates staffing requests to be initiated after a vacancy is identified and a staffing consultant is contacted. Ordinarily, one would anticipate that the CEO was the person to initiate the staffing request and not the Minister.

Notably, when the Premier or Cabinet hires or transfers deputy ministers and assistant deputy ministers, they do so by issuing publicly available Orders-In-Council. For example, the current Clerk of the Executive Council was the subject of 10 Orders-In-Council documenting her stellar career within the public service. Ms. Foote's placement in the Executive Director position was not authorized by an Order-In-Council.

In conclusion on this allegation, we find that the Board of Directors' stated goal of using the merit principle for hiring for, among others, the Director of Marketing and Development, was undermined by the intervention of Minister Mitchelmore to direct the CEO and the Board to hire Ms. Foote. There is no evidence that suggests that an analysis of Ms. Foote's qualifications was assessed in comparison to other potential candidates; therefore, it is impossible to conclude that she was the best qualified person for the position. The move by Ms. Foote to The Rooms was not similar to other lateral transfers within the senior executive of the public service in that: a) The Rooms operates under its own legislation with authority over human resources vested in the CEO; b) the executive position was created after the intervention of Minister Mitchelmore; c) an Order-In-Council, under the Executive Council Act was not used to authorize her employment at The Rooms.

In determining whether Minister Mitchelmore's actions are a gross mismanagement of his Code of Conduct responsibilities or just a breach of that Code, we have considered a number of factors. We find that there were serious deviations from standard policies and practices which include:

- a) The direction or condoning of the elevation of the marketing and development position to an executive position, literally on the same day that the Board of Directors, after considerable work and consultation with the Human Resource Secretariat, had determined that it should be a director level.
- b) The direction or condoning of the Board of Directors and the CEO to hire Ms. Foote in the absence of a job competition or the provision of a resume, let alone the conduct of a job competition.
- c) The said direction to hire was in contrast to other transfers within the senior executive of government in that it was not supported by an Order-in-Council.

We also note that the Commissioner for Legislative Standards ruled that MHA Joyce breached his Code of Conduct obligations by trying to cause a colleague to interfere, without success, in a Public Service Commission job competition.

We have had the opportunity to consider the very able submissions of Minister Mitchelmore's solicitor on this issue. A key theme of those submissions is that the hiring of Ms. Foote at The Rooms could not happen without the approval of Mr. Brinton, and that if he or the Board disagreed with the hiring, that fact was not made known to Minister Mitchelmore. With respect, we disagree. We find, much like the directive to rescind the contract of A.B., Mr. Brinton was directed to sign the Request for Staffing Action Form and Ms. Foote's contract. The evidence of not just Mr. Brinton, but the members of the Executive Committee of the Board support that conclusion. We also accept the evidence of the Executive Committee that when faced with this direction from the Minister, they felt compelled to comply. This is consistent with their subsequent actions and the fact they voiced their discomfort with the decision to the Deputy Minister when he followed up with them to see if they were on board.

We conclude that Minister Mitchelmore's actions in intervening to facilitate the hire of Ms. Foote at The Rooms not only breached his Code of Conduct, but grossly mismanaged his obligations under that Code. Specifically, we find that Minister Mitchelmore fundamentally mismanaged his obligations pursuant to the following provisions:

- The fundamental objectives of his holding public office is to serve his fellow citizens with integrity in order to improve the economic and social conditions of the people of the Province. (2)

- That he act lawfully and in a manner that will withstand close public scrutiny. (4)

- That he base his conduct on the consideration of the public interest. (7)

- That his relationship with government employees should be professional and based upon mutual respect and should have regard to the duty of those employees to remain politically neutral when carrying out their duties. (10)

Allegation 3

Minister Mitchelmore instructed staff to set the salary for the Executive Director of Marketing and Development position to which Ms. Foote was appointed at \$132,000.00, far exceeding the salary provided for in the vacant Director of Marketing and Development position at The Rooms, thereby grossly mismanaging public funds.

The uncontradicted evidence collected during this investigation supports the following findings:

- The position of Director of Marketing and Development which existed at The Rooms prior to 2018 commanded a salary of approximately \$80,000.00.

- The contract of employment negotiated by Mr. Brinton with A.B. to act in the Director of Marketing and Development position for an eight-month term provided for an annual salary of \$85,513.

- The position of Director of Marketing and Development approved within the organizational structure of The Rooms by the Board of Directors on September 21, 2018, contemplated a salary within the HL 24 level (Appendix G, p.10). That pay range starts at \$76,666 and culminates with a salary of \$107,612. The Board of Directors anticipated that the final classification would be in accordance with applicable Human Resource Secretariat policies.

- A search of the Order-in-Council database at the Cabinet Secretariat reveals that on September 28, 2018, the Executive Council appointed a replacement for Ms. Foote in her former position of Associate Secretary to Cabinet (Communications) effective October 1, 2018. The replacement was paid on the Executive Compensation Plan.

Minister Mitchelmore maintained in his interview with us, and through written submissions of his solicitor, that he didn't dictate the rate of pay for Ms. Foote. Rather, she moved laterally from an executive level position of Associate Secretary to Cabinet reporting to the Premier, to an executive level position at the Rooms and, because it was a lateral move, her salary did not change.

Section 8 of Minister Mitchelmore's Code of Conduct requires that he, in performing his official duties, apply public resources prudently. The underlying rationale for this Code requirement was exemplified by former cabinet minister Cathy Bennett, when she stated:

"The days of having a culture of spending and not being reverent to the public purse are over, and we are expecting all those entities to sharpen their pencils and to go through their operations in a way that is

responsible and in a way the people of the Province expect”

Minister Mitchelmore’s rationale for how Ms. Foote received a salary of \$132,000 at The Rooms does not take into account what transpired. As noted, in our Findings on Allegation #1, Ms. Foote’s transfer to The Rooms was different from lateral transfers between line departments. There is ample evidence to suggest that The Rooms could have recruited highly competent candidates for the position of Director of Marketing and Development with compensation allocated in the HL 24 salary range. The Board of Directors, after studying how best to organize its institution, had decided that an HL 24 salary scale was appropriate for the position. The reclassification by the Board of the position on September 27, 2018, was to accommodate the hire of Ms. Foote. The net effect is that The Rooms is overcompensation for the position of Executive Director of Marketing and Development in the range of \$30-\$40,000 per year. We also note that government didn’t realize any salary savings by keeping Ms. Foote’s former position vacant, as a replacement was appointed for her upon the commencement of her work with The Rooms.

In may be that Minister Mitchelmore did not directly order the executive pay level for Ms. Foote, though we do note he signed the Request for Staffing Action Form which authorized it. One of the factors listed earlier in this report for assessing gross mismanagement was a review of the functions and responsibilities of the public servant alleged to be responsible for gross mismanagement. Reasonable people would expect the Minister of the Crown to exact strict scrutiny to a request for additional salary expenditures. Indeed, that is nearly universally the case. Here, Minister Mitchelmore either directly authorized the salary level for Ms. Foote thorough his signature on the Request for Staffing Action Form, and/or acquiesced in her receiving that level of pay. Having done so, we find that Minister Mitchelmore grossly violated his obligations as contained in section 8 of the Code of Conduct.

THE JULY 29, 2019 SUPPLEMENTAL REPORT

As noted in my introduction to this report, on July 29, 2019 the Citizen’s Representative issued a Supplemental Report. This report was issued after additional submissions from the Clerk of the Executive Council and Minister Mitchelmore’s legal counsel were reviewed, analyzed, and considered.

The Supplemental Report did not change the recommendations and findings of the June 11, 2019 Report and reiterated a call for review by the Commissioner of Legislative Standards.

In the Supplemental Report, the Citizens’ Representative addressed procedural fairness, and the submissions of the Clerk of the Executive Council and Minister Mitchelmore’s legal counsel.

With respect to procedural fairness, Minister’s legal counsel wrote the Speaker of the House of Assembly on June 19, 2019 advising that in his opinion procedural fairness was not followed in the entire process as the Citizens’ Representative did not interview the Clerk of the Executive Council or individuals within the Human Resource Secretariat.

The Citizens’ Representative addressed the procedural fairness allegation in writing on June 27, 2019 in a letter to the Speaker.

Given that 58(4) of the Act specifically references that the “investigator shall ensure that the right to procedural fairness of all persons involved in an investigation is respected” it is prudent for me to set out the record clearly with respect to

this issue. In his June 27, 2019 letter to the Speaker of the House of Assembly, the Citizens' Representative advised the speaker as follows with respect to this issue:

I am in receipt of correspondence to you dated June 19, 2019 from legal counsel for the Honourable Christopher Mitchelmore.

The letter alleges that the OCR did not provide Minister Mitchelmore with procedural fairness because it did not contact the Clerk of the Executive Council or an official from the Human Resource Secretariat.

For the record, on January 4, 2019 the OCR wrote the Minister and gave him notice of the commencement of the investigation. That letter specifically mentions the fact that the OCR was investigating the hiring of Ms. Carla Foote at the Rooms. It not only invited, but required, that the Minister provide all documents, papers and things in his possession with respect to that issue. Part 2 of that letter, written by my predecessor, states "I also provide all parties with procedural fairness which means I will unbiasedly assess all evidence you provide and objectively consider any submissions you forward to me."

Counsel for the Minister requested further information in the form of detailed allegations from OCR on February 1, 2019, stating in closing "It is the position that the rules of procedural fairness in administrative matters entitle Minister Mitchelmore to such information and an opportunity to reply."

On February 18, 2019 the OCR provided counsel for the Minister with a letter inviting him to make submissions on 13 pages of detailed allegations. That documentation included the particulars of the evidence against his client, and possible outcomes for the investigation based on that evidence.

The record shows OCR did not receive a substantive response, even though it was an opportunity to indicate that the Clerk or HRS, or other public officials, had pertinent information relating to any opinion or technical endorsement of the hire at issue in 2018 by the Clerk or HRS.

Counsel's only request following the list of detailed allegations of February 18 was for copies of emails relating to the terminated contract with "AB" as referenced in the report, and Rooms Board of Directors minutes held by OCR. Both were provided on March 7, 2019.

In addition on February 26, 2019 we disclosed to counsel, among other things, a summary of material we obtained by subpoena via the Deputy Minister of the Human Resource Secretariat relating to a previous job competition at the Rooms.

On April 9, 2019 the Minister was interviewed for approximately one hour. He was asked direct questions about:

- (a) the Request for Staffing Action Form which he signed and is accountable for,*
- (b) the process by which Ms. Foote was hired,*
- (c) why an Order-in-Council was not used to facilitate the hire, and*
- (d) the decision-making process and rationale that eventually led to Ms. Foote being hired.*

The only suggestion made by the Minister during his interview that HRS be contacted by OCR was in the context of highlighting the past hiring practices of the CEO of the Rooms, not the Minister's role in the hiring under investigation or any process associated with that hire:

Q. Is there anything else you'd like to tell me about this whole saga? You've seen the allegations.

A. Yes.

Q. Is there anything else I need to know?

A. No. No...all I can say is that throughout this whole process this is not the only issue or incidence of HR concern with the Rooms in terms of how the CEO has looked at hiring, and has been told multiple times about this, and HRS or those within government can certainly highlight where they have had issues or concerns with how the CEO approaches HR matters.

Following the interview, the Minister and his counsel were once again invited to provide submissions, with counsel doing so on April 17, 2019. Nowhere in those submissions is reference made to the need for further investigation, or any corroborating witness evidence that may be helpful in establishing, or us understanding, his position about the "appropriate processes" that were cited in his counsel's recent letter.

My review of this request concludes that for a period in excess of six months, if the Minister was aware or became aware that the Clerk of the Executive Council or an official at the Human Resources Secretariat had pertinent evidence speaking to the process he followed in commissioning the hiring under investigation, he was afforded an opportunity to provide it, cite it, rely on it in testamentary and/or documentary evidence. Indeed, if he had documents or any other form of evidence of direct exchanges whatsoever with the Clerk, HRS, his communications team or any other public or political officials in this matter, at any time material to the period covered by the investigation, he had a duty under law to disclose them.

I conclude that the Minister was given meaningful opportunities throughout the process and was permitted at all times to state his case in the manner he saw fit, including during the nine weeks that elapsed between his interview and the issuance of the report.

To date, no one has indicated the probative evidentiary value of conducting the suggested interviews, and the research phase of the investigation did include the acquisition and analysis of, among other things, publicly-available standards for government hiring including the Human Resource Policy Manual, information on position management, human resource planning, and the government employment contract policy.

With all that being said, today, at the request of the Clerk of the Executive Council I met with her and her officials to hear their position in this matter. This was not an interview on the record. By copy of this letter, I am respectfully requesting a written submission from Executive Council by close of business on July 12, 2019. Following an analysis I will again notify you, Mr. Speaker, and the Clerk of the House of Assembly of my opinion.

In the Supplemental Report, the Citizens' Representative addressed the Clerk of the Executive Council's Submission. With respect to the applicability of the **Public Service Commission Act**, the Citizens' Representative concluded as follows:

The Public Service Commission Act promotes the merit principle in hiring within the public service. Section 4 of

the PSC Act outlines a long list of positions exempted from the PSC Act for the purpose of hiring.

Included in those exemptions are positions compensated under the Executive Pay Plan and contractual positions. Section 2 (f) defines contractual employee to mean a person employed for a certain term for the purpose of performing certain work

During our investigation we obtained a copy of Ms. Foote's contract with The Rooms. Unlike the (then) CEO's contract for a term of five years, Ms. Foote's contract is unquestionably open ended, and for unknown reasons is described as "renewable". In any event, there is no specific term in force. In Section 1.3, Ms. Foote is hired from October 1, 2019, until terminated, pursuant to the terms of the agreement. This is not a designated length of time one would attribute to the definition of a "term" in its grammatical, legal or ordinary sense. Rather, the open-ended nature of the contract is akin to what one might find in a contract for a full-time employee.

Therefore, in our view, Ms. Foote is not a "contractual employee" as anticipated by Section 2(f) of the PSC Act. We respectfully disagree with the statement in the Executive Council submission which states, "the PSC Act does not apply to contractual employees per Section 4(n) and no competition was required for that reason.

We are of the view that the only possible way her employment can be exempt from the ambit of the PSC Act is because she is being compensated on the Executive Pay Plan.

The Citizens' Representative continues in its Supplemental Report to discuss the hiring of Ms. Foote in an Executive Position. In relation to this issue, the Citizens' Representative concluded as follows:

Executive Council concurs with our initial assertion that executive positions throughout government are filled by Orders-in-Council. They advise that no executive position was created when Ms. Foote was hired and state "the contractual position created at the Rooms in 2018 were titled "Executive Directors" to be consistent with other contractual positions within government and Crown agencies, and the title does not determine whether it is an executive position within the government structure." Executive Council provided examples from the Royal Newfoundland Constabulary, Service NL and the Newfoundland and Labrador Housing Corporation.

As indicated earlier, we have reviewed Ms. Foote's signed contract. In form and substance it is strikingly similar to others we have seen for government executives. Ms. Foote is not only paid on the Executive Pay Plan (reference Section 2.1), but "general salary and step increases applicable to Executive Employees shall apply."

Her travel expenses are reimbursed at rates paid to Executives.

She receives 30 days' paid leave per year akin to Executives.

Contrary to the Minister's repeated public assertions that this was a lateral move, the Executive Council states the Executive Director position is not equivalent to an executive position in government, so it is not considered a lateral move within the government structure.

In sum, if Ms. Foote is not an Executive, then her appointment to the position violates the PSC Act as in our opinion she is not a contractual employee as defined therein. Alternatively, if for argument sake, she does hold an Executive Position, an Order-in-Council was required for her appointment.

The Citizens' Representative also addressed the Executive Council's submission regarding the Request for Staffing Action Form (RSA) and concluded as follows:

Executive Council states that RSAs are not always completed and there is no requirement for completion unless the signing authorities are not otherwise satisfied that they have the information they need to determine whether the RSA should be approved.

We are somewhat perplexed by this position. Appendix J of our June 11 Report outlines the instructions for completing the RSA. It is a copy of an official document produced by the Strategic Staffing Division of the Human Resource Secretariat of Executive Council. Those instructions indicate that the form must be completed for all RSAs and should articulate why the position needs to be filled at this time and the potential impacts of not proceeding. We note that the RSA signed for the Executive Director of Museums and Galleries contained a fully completed "Rationale for Staffing" section. As an ombudsman office, we are generally wary of deviations from explicit policy direction.

In conclusion, we thank Executive Council for its submission. We believe our June 11, 2019, report is premised on a clear understanding of the hiring practices within the public service, and contains a full account of the evidence collected which supports our findings and recommendations. With respect, we will not be changing these findings and recommendations.

As noted previously, this report did not alter or change the findings or recommendations made by the Citizens' Representative in its June 11, 2019 report. The report concludes as follows:

Our function in public interest disclosure is to investigate and report in an unbiased and independent manner, having regard to the documentary and testimonial evidence and deliberating using the civil test of balance of probabilities. Having considered the additional submissions received in the post June 11 period, we will not be altering the findings and recommendations of our initial report, and reiterate a call for review by the Commissioner of Legislative Standards for scrutiny of these issues for potential code violations.

In light of the request from the Speaker of the House of Assembly, I wrote Minister Mitchelmore on June 18, 2019 advising him that the Citizens' Representative June 11, 2019 report was provided to me to take appropriate action in light of the recommendation of corrective action, highlighted the findings in the reports, and requested submissions on the code of conduct violations. On August 28, 2019 Minister Mitchelmore's legal counsel provided me with a written submission on behalf of the Minister.

ANALYSIS

At the outset, my role as the Commissioner of Legislative Standards in the context of a referral from the Speaker of the House of Assembly pursuant to s.58 (10) must be examined and clarified.

Section 54(1) of the Act defines “investigator” to mean the Citizens’ Representative appointed under the **Citizens’ Representative Act**.

Section 58(1) of the Act states that, “The investigator shall carry out investigations of matters related to allegations in a disclosure made under this Part.”

Section 58(7) of the Act states that, “Upon completing an investigation, an investigator shall report, in writing, to the clerk and the speaker on his or her findings and recommendations about the disclosure and the wrongdoing”.

Section 58(10) (a) of the Act states that, “The speaker, or the chairperson of the audit committee shall, if the report recommends corrective action, refer the report to the auditor general, the Attorney General, the Minister of Finance, or other appropriate official to take appropriate action”

A review of section 58 demonstrates that it is the statutory duty and responsibility of the Citizens’ Representative to act as “investigator” and “upon completing an investigation” to report to the clerk and the speaker “his or her findings and recommendations about the disclosure and wrongdoing.” In the event that the report recommends corrective action, as it does in this case, s.58 (10) provides the speaker with a statutory discretion to refer the report to an “appropriate official to take appropriate action.”

Minister Mitchelmore provided a written submission to my office wherein he addressed the role of the Office of the Citizen’s Representative versus the role of the Commissioner for Legislative Standards. It is his position that I am “not required to blindly accept the findings, recommendations and conclusions of the OCR”. He supports his submission by the fact that on page 1 of the Supplemental Report the Citizens’ Representative states “We also conveyed our opinion that the Commissioner of Legislative Standards should review the report as he has the express legal jurisdiction to consider alleged Code violations under subsection 36(1) of the ...Act, as well as the conventional skills and experience to further adjudication this matter under the lens of the Code.”

The comments of the Citizens’ Representative in the Supplemental Report must be viewed in context. In making the recommendation that the matter be referred to the Commissioner of Legislation Standards, the Citizens’ Representative was identifying to the speaker that my office has the statutory jurisdiction to consider alleged Code violations and the experience to “further adjudicate” the matter. The reference of the Citizens’ representative to “further adjudicate” must be viewed in light of s.58 (10)(a) of the Act, which states that if corrective action is recommended an appropriate official may take appropriate action.

It is clear that the legislature intended that the Citizens’ Representative would be the investigator with respect to public interest disclosure complaints, and that following an investigation if a report recommended corrective action the report would be provided to an appropriate official to take appropriate action. The legislation does not provide for a right of appeal following the submission of the Citizens’ Representative report and also does not indicate that a re-investigation should occur once the matter has been referred to an appropriate official to take appropriate corrective action.

To interpret the Act to require my office to conduct another investigation into the matter, after the entity that has the express statutory jurisdiction to conduct the investigation has reported fully on the matter, is not in keeping with the process established under the Act, would be an efficient use of scarce public resources, and would intrude upon the express statutory jurisdiction provided to the Citizens' Representative under Part VI the Act.

Minister Mitchelmore's submission also references the second last paragraph of the Supplemental Report wherein the Citizen's Representative reiterated "a call for a review by the Commissioner for Legislative Standards for scrutiny of these issues for potential code violations". Once again, this statement must be taken in context and considered within the overall statutory scheme set out in Part VI of the Act. The further scrutiny and review that my office is to undertake is what appropriate corrective action is necessary given the obligations that the member has failed to fulfill under the Code of Conduct.

It must be recognized that the Citizens' Representative has already determined that Code of Conduct violations have occurred. The term "wrongdoing" is defined in s.54 (1)(e) of the Act and includes "gross mismanagement, including of public money under the stewardship of the commission, in violation or suspected violation of a code of conduct." Therefore, in conducting his investigation under Part VI of the Act, the Citizens' Representative has express statutory jurisdiction to determine if a code of conduct violation occurred.

A review of the June 11, 2019, report demonstrates that the Citizens' Representative has concluded that Minister Mitchelmore breached his Code of Conduct. Page 29 of the Report reads as follows:

We conclude that Minister Mitchelmore's actions in intervening to facilitate the hire of Ms. Foote at The Rooms not only breached his Code of Conduct, but grossly mismanaged his obligations under the Code.

On page 32 of the June 11, 2019 report the Citizens' Representative stated, in part, that:

Reasonable people would expect the Minister of the Crown to exact strict scrutiny to a request for additional salary expenditures. Indeed, that is nearly universally the case. Here, Minister Mitchelmore either directly authorized the salary level for Ms. Foote through his signature on the Request for Staffing Action Form, and/or he acquiesced in her receiving that level of pay. Having done so, we find that Minister Mitchelmore grossly violated his obligations as contained in section 8 of the Code of Conduct.

The Citizens' Representative had the statutory jurisdiction under Part VI of the Act to make the above noted findings and conclusions. It is not my role to revisit these finding, but rather to determine what appropriate corrective action should be recommended in the circumstances.

Allegation 1 reads as follows:

Commencing on March 2018 and continuing until October 2018, Minister Mitchelmore directed staff of The Rooms Corporation ("The Rooms") to hire Ms. Carla Foote as Executive Director of Marketing and Development without competition or a position description, in violation of generally accepted human resource practices, including the application of the merit principle within the Public Service.

In relation to this allegation the Citizens' Representative concluded that Minister Mitchelmore fundamentally mismanaged his obligations pursuant to the following provisions:

- **The fundamental objective of his holding public office is to serve his fellow citizens with integrity in order to improve the economic and social conditions of the people of the Province. (2)**
- **That he act lawfully and in a manner that will withstand close public scrutiny. (4)**
- **That he base his conduct on the consideration of the public interest. (7)**
- **That his relationship with government employees should be professional and based upon mutual respect and should have regard to the duty of those employees to remain politically impartial when carrying out their duties.**

In Minister Mitchelmore's submission to my office, he strenuously denied that he committed gross mismanagement and that corrective action was either appropriate or required. He submits further that if corrective action is required that any corrective action must be related to changes to human resource policies and practices of government, and not relate specifically to Minister Mitchelmore.

According to the Minister Mitchelmore's solicitor:

"..none of the penalties in section 39 of the Act are appropriate as they would all require a finding of wrongdoing on the part of Minister Mitchelmore and they would be inappropriate or excessive. In its Initial Report, the OCR referred to the Joyce Report, a case with a very different set of facts and with little to no precedential value other than for comparison purposes to illustrate that corrective action personal to Minister Mitchelmore would not be appropriate. The Clerk of the Executive Council has offered her clear and unequivocal opinion that Minister Mitchelmore did nothing wrong and followed policy and procedure."

I do not accept Minister Mitchelmore's submission that corrective action is not appropriate or required in the circumstances. It is clear upon a review of the investigatory reports conducted by the Citizens' Representative that Minister Mitchelmore was provided with procedural fairness throughout and the Citizens' Representative considered all submissions presented to him in detail, including the submission of the Clerk of the Executive Council.

The findings on page 27 of the Citizens' Representative June 11, 2019 report include that as a result of the Minister's intervention, the Board of Directors had to amend their organization structure to accommodate what they perceived to be a direct order from the Minister to hire Carla Foote. As noted by the Citizens' Representative, "there was no evidentiary basis for the Board to elevate the position from "director" to "executive director" between September 21, 2018 and September 27, 2018, but for the intervention of the Minister."

The Citizens' Representative goes on to state on page 29 that "In conclusion on this allegation, we find that the Board of Directors' stated goal of using the merit principle in hiring, for among others, the Director of Marketing and Development, was undermined by the intervention of Minister Mitchelmore to direct the CEO and the Board to hire Ms. Foote."

It is also clear from a review of the June 11, 2019 Citizens' Representative report that "Mr. Brinton was directed to sign the Request for Staffing Action form and Ms. Foote's contract. The evidence of not just Mr. Brinton, but members of the Executive Committee of the Board support that conclusion. We also accept the evidence of the Executive Committee that when faced with this direction from the Minister, they felt compelled to comply."

As noted by the Citizens' Representative, the section of the Request for Staffing Action Form applicable to Ms. Foote's

hiring was incomplete. The Rationale for Staffing section of the Form appears in Part IV, just above Part V entitled Authorization, on the same page as the signature page wherein Minister Mitchelmore approved the hiring of Ms. Foote.

The Rationale for Staffing section reads as follows:

Please provide a detailed explanation which includes rationale for staffing; how a short- or long-term vacancy will impact operations and why this position needs to be filled at this time; whether hard-to-fill (list the examples); and if there are no other similar positions or no ability to redistribute duties of this vacancy elsewhere (including any supporting metrics or transaction data.)

The Instructions for completing the Request for Staffing Action form appear at Appendix J of the Citizens' Representative June 11, 2019 report and state the following with respect to the completion of Section IV Rationale for Staffing:

The Management Contact is responsible for completing this section of the form. This section must be completed for all RSA's and should articulate why this position needs to be filled at this time and the potential impacts of not proceeding."

When questioned by the Citizens' Representative regarding the incomplete section on "Rationale For Staffing" the Minister stated the following:

I can't explain why that isn't complete. It certainly should have been complete and I review requests for staffing actions on a very regular basis no different that many other documents I review. It's quite regularly that I catch matters of either spelling errors or other things. In this particular case I guess it's something I didn't see as being left blank. I had signed it. The CEO had signed it. And this would have been something that I expect those that are filling out and completing these forms...I never complete any of these forms as a Minister. It wouldn't be my role to do so. I review them. I would expect that all the people who would completed and filled in all the appropriate details.

The comments of Minister Mitchelmore must be considered within the overall factual context with respect to what was occurring at the time. According to the Citizens' Representative, as a result of Minister Mitchelmore's intervention the Board of Directors had to change their organizational structure and perceived the hiring of Ms. Foote as a direct order. In my opinion, in such circumstances one would reasonably expect that a Minister acting prudently would ensure that he was fully informed by staff to ensure that procedures were followed correctly to demonstrate that he was reasonably informed as to the rationale for the hiring of Ms. Foote.

It is not enough for the Minister to say that he relied upon officials to ensure that this form was completed with the appropriate details. While it is recognized that the Clerk of the Executive Council indicated that this section of the form is not always completed, this submission is contrary to the explicit "Instructions for Completing the Request for Staffing Action Form." As noted by Justice Green at page 5-4 of his report, wherein he quoted political sociologist Max Weber, "the honor of the political leader, of the leading statesman...lies precisely in an exclusive personal responsibility for what he does, a responsibility he cannot and must not reject or transfer."

Minister Mitchelmore needs to accept responsibility for his actions in this matter. He was directly involved at the outset with respect to the hiring of Ms. Foote at the Rooms and according to the Citizen's Representative it was his intervention that allowed her to secure employment at The Rooms. The fact that there was confusion about the process is evident given that the Minister what of the view that the transfer of Ms. Foote to The Room was a lateral transfer, but the Clerk

of the Executive Council confirmed this not to be the case. In addition, there appears to be some disagreement between the Clerk of the Executive Council and the Citizens' Representative on the necessity of the Request for Staffing Action Form being completed according to policy.

However, what is clear is that ultimate responsibility and accountability lies with the Minister, and before authorizing the employment of Ms. Foote he had a responsibility to ensure that all processes were followed correctly. If there was uncertainty or confusion regarding the process any uncertainty should have been rectified before providing his authorization.

It also appears clear from the findings of the Citizens' Representative, that Minister Mitchelmore's conduct placed the Executive Committee of the Board of Directors of the Rooms and its' former CEO in a very awkward and uncomfortable position. The Minister's intervention caused the Board of Directors to have to change its organizational structure after it had been approved. In my opinion, his overall conduct in this matter is in keeping with the Code of Conduct violations identified by the Citizens' Representative and corrective action is necessary.

Allegation 3

Minister Mitchelmore instructed staff to set the salary for the Executive Director of Marketing and Development position to which Ms. Foote was appointed at \$132,000.00, far exceeding the salary provided for in the vacant Director of Marketing and Development position at The Rooms, thereby grossly mismanaging public funds.

With respect to this allegation the Citizens' Representative concluded that Minister Mitchelmore grossly violated his obligations as contained in section 8 of the Code of Conduct.

Section 8 of the Code of Conduct reads as follows:

In performing their official duties, Members will apply public resources prudently and only for the purposes for which they are intended.

As noted on page 31 of the Citizen's Representative June 11, 2019 report:

"There is ample evidence to suggest that the Rooms could have recruited highly competent candidates for the position of Director of Marketing and Development with compensation allocated in the HL 24 salary range. The Board of Directors, after studying how best to organize its institution, had decided that an HL 24 salary scale was appropriate for the position. The reclassification by the Board of the position on September 27, 2018 was to accommodate the hire of Ms. Foote. The net effect is that the rooms are overcompensating for the position of Executive Director of Marketing and Development in the range of a \$30 - \$40,000 per year. We also note that government didn't realize any salary savings by keeping Ms. Foote's former position vacant, as a replacement was appointed for her upon the commencement of her work with the Rooms."

As noted by Justice Green in his report on page 5-1:

"There must be a heightened sense of responsibility and appreciation that they are the guardians of the public purse and a willingness to be proactive and vigilant to ensure that even inattention to duty or complacency does not contribute to system breakdown."

The failure of Minister Mitchelmore to take the steps necessary to ensure that proper processes were followed in the hiring of Ms. Foote, including a detailed appreciation for the financial impact of his actions, did not live up to the sense of responsibility and appreciation as a guardian of the public purse and corrective action is necessary for violating section 8 of the code.

Section 39 of the Act reads as follows:

39. Where the commissioner determines that a member has failed to fulfil an obligation under the code of conduct, he or she may recommend in the report under section 38


- (a) that the member be reprimanded;**
- (b) that the member make restitution or pay compensation;**
- (c) that the member be suspended from the House of Assembly, with or without pay, for a period specified in the report; or**
- (d) that the member's seat be declared vacant.**

As noted previously, in Minister Mitchelmore's submission his solicitor submitted that if any corrective action is required it must be related to changes to human resource policies, and not relate specifically to Minister Mitchelmore. I do not agree. It is noteworthy that the Speaker of the House of Assembly also forwarded the Citizens' Representative report to the Clerk of the Executive Council. If changes or clarifications to human resource policies are required as a result of this matter, the task of recommending that corrective action is best completed by the Clerk of the Executive Council who can work with appropriate government departments.

In providing the Citizens' Representative reports to me, my duty is to decide what appropriate corrective action is necessary given the findings of the Citizens' Representative with respect to Code of Conduct violations. While some may suggest that appropriate action should not be penal in nature and should be forward looking, as the Commissioner of Legislature Standards I cannot turn a blind eye to these code violations and a penalty is required to accomplish the purposes of general and specific deterrence. All members of the House of Assembly should be aware that their actions and inactions may carry significant consequences, and recognize that appropriate corrective action may include one or more of the penalties enumerated in s.39 of the Act.

It must be recognized that both the Citizens' Representative and the Commissioner for Legislature Standards are necessary checks and balances upon all elected members of the House of Assembly. The independence and neutrality of these offices is a necessary transparency and accountability mechanism to ensure that all of our elected officials are acting in the best interests of the people of the Province. In the present context, the Citizens' Representative conducted a detailed investigation and made significant findings and conclusions based upon its review of the matter. The fact that these findings involve a Cabinet Minister is immaterial to the obligation that all members of the House of Assembly have to live up to their code of conduct obligations.

When initially making a decision about the future of Ms. Foote, Minister Mitchelmore had a duty to ensure that the appropriate processes were followed, the appropriate expertise was consulted and that the necessary checks and balances were complied with. This includes but is not limited to making a determination of what process to follow.



There have been differing opinions from the Clerk of the Executive Council, the Citizens Representative and legal counsel for Minister Mitchelmore as to the nature of the appointment of Ms. Foote. Accordingly, the mitigating factor in determining the appropriate penalty is that there are a number of differing opinions as to what was the proper procedure. Minister Mitchelmore bears responsibility for his actions and his participation in the authorization of the hiring of Ms. Foote in a manner that the Citizens' Representative determined was not in compliance with hiring practices, and which resulted in the Board of Directors of the Rooms having to amend its organizational structure. Therefore, it is my opinion that Minister Mitchelmore should be reprimanded in accordance with s.39(a) of the Act.



APPENDIX A:

**Citizen's Representative Report,
June 11, 2019**



**Office of the Citizens' Representative
Newfoundland and Labrador**

**Report of the Citizens' Representative
In the Matter of a**

**Public Interest Disclosure
Made Under
*Part VI of the House of Assembly
Accountability, Integrity and Administration Act***

June 11, 2019

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APPENDICES

- APPENDIX A:** Letter from Barry Fleming, QC, to the Honourable Christopher Mitchelmore dated January 4, 2019.
- APPENDIX B:** Letter from Barry Fleming, QC, to Carla Foote, dated January 11, 2019.
- APPENDIX C:** Letter from Barry Fleming, QC, to the Solicitor for Minister Mitchelmore (with enclosures) dated February 18, 2019.
- APPENDIX D:** Letter from the Solicitor for Minister Mitchelmore to Barry Fleming, QC, Dated April 17, 2019.
- APPENDIX E:** A Draft Letter for Dean Brinton's Signature to A.B., dated June 15, 2018.
- APPENDIX F:** A Sample of The Rooms Standard Letterhead.
- APPENDIX G:** The Presentation Given to The Rooms Board of Directors on the Reorganization of The Rooms by a Sub-Committee of the Board on September 21, 2018.
- APPENDIX H:** Request for Staffing Action Forms Signed by Minister Mitchelmore and Dean Brinton for New Executive Positions in September and October 2018.
- APPENDIX I:** Press Release of January 14, 2016, with Backgrounder for Carla Foote.
- APPENDIX J:** Instructions for Completing the Request for Staffing Action Form.
- APPENDIX K:** Competition Summary: Director of Marketing and Development.

THE INVESTIGATION

On December 13, 2018, we received a package from a lawyer who was representing a public service employee. The package contained a seven-page letter from that employee alleging that Minister Mitchelmore committed a series of wrongdoings as defined by the Act, in relation to a hiring at The Rooms. The package also included 12 documents which the employee alleged supported the allegations. As required by section 58 of the Act, we acknowledged receipt of the package. We subsequently reviewed all the information in the package to confirm that the allegations met the requirements for specificity as outlined in the Act.

On January 4, 2019, we commenced our investigation. We wrote Minister Mitchelmore to give him notice of the investigation and to outline the allegations against him (**APPENDIX A**). We also requested that he provide all documentation associated with the issues raised in our letter. We also wrote Dean Brinton, Chief Executive Officer of The Rooms, to summons all documentation in his possession related to the allegations, and requiring him to attend an interview with us to discuss the matter.

On January 11, 2019, we wrote Ms. Carla Foote to advise her that an investigation had commenced centering around her appointment to the position of Executive Director of Marketing and Development with The Rooms (**APPENDIX B**). The letter indicated that she was not a subject of the investigation. We offered to meet with her at any time to discuss the investigation, or to answer any questions she might have.

Over the course of our investigation nine witnesses were interviewed. We conducted research on the application of the merit principle in the public service, best practices for human resource management, the legal requirements for storing and deleting e-mail, and the policy surrounding filling vacant positions within the public service. We summoned from the Human Resource Secretariat all material related to a 2016 job competition for the vacant Director of Marketing and Development position at The Rooms.

On February 18, 2019, we forwarded to Minister Mitchelmore's solicitor a document outlining a summary of what the evidence collected so far suggested for each allegation, and an outline of what considerations would arise if that evidence was accepted (**APPENDIX C**). We invited submissions and any further documents the Minister wished to provide. The investigation continued and we provided Minister Mitchelmore's solicitor with any new relevant information we obtained. Minister Mitchelmore was interviewed on April 9, 2019, and his solicitor provided written submissions on April 17, 2019 (**APPENDIX D**).

Throughout our investigation we had the full cooperation of all parties and witnesses.

THE EVIDENCE

The CEO

Dean Brinton is the Chief Executive Officer (the CEO) of The Rooms Corporation. He has studied philosophy and comparative religion at the Universities of Calgary and Toronto, receiving a

Master's degree from the University of Toronto in 1987. He has worked in the arts and culture sector for over 30 years and was appointed CEO of The Rooms in January of 2005. He has been, and continues to be, affiliated with a number of national organizations that deal with arts and culture. For example, he is the Vice Chair of the Board of Trustees for the Canadian Museum of History and the Canadian War Museum. He also has extensive experience with board governance. He has received the Meritorious Service Medal from the Governor General of Canada, as well as the Queen Elizabeth II Diamond Jubilee Medal.

Upon commencing our investigation on January 4, 2019, we wrote Mr. Brinton to request documentation relating to the allegations and his attendance at an interview. He was interviewed on January 10, 2019.

During the fall of 2017, The Rooms' Director of Marketing and Development resigned and accepted a position with a private firm. In early 2018, Mr. Brinton, with the aid of the Public Service Commission, commenced a job competition to fill the vacancy. Completion of an undergraduate degree in Business or Commerce was mandatory. Approximately 77 people applied for the position; interviews were conducted; and a short list of prospective candidates was developed. There were numerous candidates who held Master's degrees. Mr. Brinton stated that around this time he was anticipating a possible cut to the government subsidy to The Rooms. He stated that a budget cut a few years previously had trimmed \$1.3 million from The Rooms' \$8 million budget. This necessitated laying off 15 people. He explained that he thought it was prudent to defer the hiring of the Director of Marketing and Development so as to avoid the possibility of terminating a successful candidate because of a budget cut.

Mr. Brinton explained that he was not surprised at the number of candidates who applied for the Director of Marketing and Development position who held Master's degrees. Members of the senior executive of The Rooms have traditionally held professional designations or Master's degrees.

He explained that the vacant Director of Marketing and Development position had an HL 24 pay scale. The scale ranged from approximately \$76,000 - \$99,000 annually.

Mr. Brinton explained that from time to time The Rooms will use salary from vacant positions to hire contract staff. Sometimes, because of the backlog at the Public Service Commission, he would hire individuals on short-term contracts. Those individuals were always informed that they would have to participate in a Public Service Commission recruitment. Over the past 14 years no employee was given an indefinite contract without a Public Service Commission competition.

On March 1, 2018, Mr. Brinton was in Ottawa attending a board meeting of the Canadian Museum of History. He received either an e-mail or telephone call indicating that Minister Mitchelmore wished to speak with him. He left the board meeting and had a 15 or 20 minute telephone conversation with the Minister in which a number of issues were discussed. The conversation started with a discussion of an issue which had received some public notoriety. The Rooms had issued a request for proposals for an agency of record. The request for proposals and associated documents drafted by The Rooms had given an example of where a company might be in a conflict of interest with the provincial government. One example cited in the documents was that contractors critical of the Muskrat Falls Project would be in such a

conflict of interest. The CEO stated that he informed the Minister the example used was unfortunate, and had not been vetted by him prior to its release.

Minister Mitchelmore indicated that The Rooms could use some communication support and that he had someone in mind for the position. Mr. Brinton said he indicated to Minister Mitchelmore that The Rooms never employed a communications professional. He said he felt it was a bit murky for the Minister to make a direct approach to him about a prospective employee, but as he perceived the employment would be short-term, he indicated to the Minister that he would consider a candidate forwarded by him. He indicated that he would have considered the Minister's candidate subject to that person being qualified for the position. The conversation ended without either the Minister or Mr. Brinton discussing the next steps in the hiring process.

Mr. Brinton indicated that he was subsequently informed by the Deputy Minister of Tourism, Culture, Industry and Innovation (TCII) that the arrival of the Minister's candidate was imminent. In late April and early May, having not heard from the Deputy Minister, he e-mailed him to inquire about the status of the referral. On March 27, 2018, under the subject "Director of Marketing", he wrote:

"Ted, when do you think we might be able to move on this?"

On May 3, under the same subject, he wrote:

"Hi Ted, any news on the candidate? With tourism season coming on, it's really time to get someone in the job asap. Thanks."

Those e-mails did not receive replies. Mr. Brinton stated that by the middle of May he was of the view that the issue of the referral of the Minister's candidate had passed.

Mr. Brinton indicated that over the years he had received conflicting advice as to whether he needed the Minister's consent to negotiate short-term contracts of employment. In any event, any signature required by the Minister on a Request for Staffing Action Form signified financial approval for the hire, as opposed to an assessment by the Minister of the merit of the hire from a human resource perspective.

Mr. Brinton explained that The Rooms was able, with existing staff, to function after the Director of Marketing and Development position was vacant. This was possible because of the great success of the 2016 History of Beaumont Hamel celebrations. Those celebrations attracted a high number of attendees at The Rooms. It was able to maintain the momentum from those celebrations through 2017. By 2018, he felt that there was a need to ramp up the marketing function to maintain or increase attendance. A number of new programs were being offered and a new Department of Programming and Public Engagement had been established, all of which needed to be marketed.

During June 2018, Mr. Brinton entered into an eight-month contract with A.B. to be the Director of Marketing and Development. He explained that he received a referral about A.B. from the head of a private marketing firm. He indicated that he had not known A.B. prior to these contract negotiations. He made the decision to hire him/her on a contractual basis after a two to three-hour interview. A.B. was told that if he/she was to be made permanent, he/she

would have to participate in a Public Service Commission competition. He explained that the salary was set in the contract at \$85,000, which would have been near the lower end of the applicable salary scale.

We requested and were provided with a copy of A.B.'s resume. He/she had nearly 25 years marketing experience, including international business development marketing and agency side senior level business development and marketing. He/she has a Bachelor of Commerce (Co-op) degree from Memorial University, a Certified Marketing Director designation and a Digital Marketing Professional Certificate from the Digital Marketing Institute.

Mr. Brinton explained that he had offered similar short-term contracts many times in the past. The contract was designed to have the work completed that would ordinarily be done by the permanent Director of Marketing and Development. The funds had already been allocated by government in the previous budget. The contract was set to expire on March 31, 2019, the end of the fiscal year, and Mr. Brinton could not predict whether government would fund the position in the upcoming fiscal year. He explained that he has numerous long-term employees who are on short-term contracts, and have been for many years.

Mr. Brinton indicated that on June 15, 2018, he received a call from the Deputy Minister advising him that someone would be coming immediately to fill the Director of Marketing and Development position. He indicated to the Deputy Minister that he had a contract in place and that he had tried to contact him previously about the issue, but to no avail. The call ended and shortly thereafter the Deputy Minister called again to advise that the Minister wanted to see the contract with A.B. and to send it immediately. He later received an e-mail containing a letter on mocked-up stationary for his signature that would revoke the contract to A.B. A copy of the letter is attached as **APPENDIX E**. For the sake of comparison a copy of The Rooms letterhead is attached as **APPENDIX F**. At about the same time he received another call from the Deputy Minister to advise that Minister Mitchelmore had instructed him to sign the letter revoking A.B.'s contract. He said he was uncomfortable doing this. Shortly thereafter he received a call from the Minister saying that he had no business signing the contract without the Minister's signature on a Request for Staffing Action Form. He replied that he was not aware of that. Minister Mitchelmore then directly instructed Mr. Brinton to sign the letter.

Mr. Brinton indicated that as this was a direct instruction from the Minister he had no choice but to sign the letter. He pointed to clause 11.1 of his employment contract which states:

...the Minister and the Board may jointly decide to terminate this agreement at any time without notice, for cause. "Cause" means the employee has willfully refused to obey a lawful instruction of the Board or the Minister, or has committed misconduct being so negligent of duty that the interest of the Corporation or the Minister is adversely affected thereby, or has otherwise been in breach of the provisions of this agreement.

Mr. Brinton said that he instructed his assistant to contact the Clerk of the Executive Council to discuss the issue. She advised that the Clerk would get back to him later that day. He says that he never received a return call.

Mr. Brinton stated that later that day his assistant received two calls from the Deputy Minister's assistant instructing her to delete the e-mail sent earlier that day containing the letter rescinding A.B.'s contract.

We requested Mr. Brinton to advise us if A.B. ever made a legal claim arising from the revocation of his/her contract. He advised that a claim letter was received by The Rooms and government in October. He advised the Deputy Minister that any payments made to satisfy the claim would have to come from government as it was government which ordered the contract rescinded. He is not aware if the claim was settled and if so, for what payment.

Mr. Brinton stated that he may have had two or three instances after June 15, 2018, where he talked with the Deputy Minister and asked who government had in mind to fill the vacant position, but was never provided an answer.

During 2018, The Rooms was undertaking an organizational review. The *Rooms Act, 2005*, established three separate divisions within the organization: an archive; museum; and art gallery. Mr. Brinton explained that the organization had evolved and collaboration was taking place between the three divisions. New legislation was passed, but not proclaimed, which would have placed the three divisions under a single corporate responsibility. The goal was to make The Rooms more entrepreneurial and better at attracting visitors.

The decision had been made within government that the new legislation would not be proclaimed until a new organizational structure was approved for The Rooms. Mr. Brinton worked with the Human Resource Secretariat of government quite extensively to develop the new structure. A sub-committee of the Board of Directors had been appointed to work with him during this process. It was never contemplated that the Director of Marketing and Development would be an executive level position. Mr. Brinton felt that marketing was not a core function worthy of an executive position, but rather something to aid and facilitate the operation of the museum, art gallery, and archives of The Rooms.

A board meeting was scheduled for September 21, 2018. A few days prior, Mr. Brinton received a draft contract from Executive Council for an Executive Director of Marketing and Development. He wrote back indicating he had a number of concerns with the draft contract; primarily, the salary far exceeded what was normally paid to the Director of Marketing and Development, but also the executive nature of the contract and the fact that it did not name who the new hire would be.

Mr. Brinton had informed the Chair of the Board about the order he received to rescind the contract to A.B. He also informed the Executive Committee about the receipt of the draft contract and his concerns with it prior to a full Board meeting scheduled for September 21, 2018.

At the full Board meeting, the sub-committee, struck to review the organizational design of The Rooms, gave a presentation outlining the details of the restructuring. The slide show that accompanied the presentation is attached at **APPENDIX G**. The Board approved the new organizational structure as outlined in that presentation.

After the meeting, at approximately 3 PM, Mr. Brinton and the Executive Committee were in his office when he received a call from both the Minister and the Deputy Minister. They asked that the Executive Committee excuse themselves. Once they did, Mr. Brinton was advised that Carla Foote would be the new Executive Director of Marketing and Development. He indicated that this was the first time he heard her name in any way associated with The Rooms. He remembered that the telephone call lasted approximately 15 minutes. He was told that he would be receiving a contract and a Request for Staffing Action Form which he was to sign. He told them he was opposed to doing so in fear of a backlash from the public and the arts community. He also stated he was not comfortable defending the hire of an individual without even seeing his or her resume. He was upset and stated that he had been a Liberal longer than either of them could remember. He also explained that he could not sign the contract and Request for Staffing Action Form for two reasons: 1) the salary was beyond what the Board had approved; and 2) the actions would require a change to the organizational structure designating the marketing function as an executive level position.

Mr. Brinton did not think it was a coincidence that he received the call about hiring Carla Foote on the same day the Board had approved a new organizational structure. Under the *Rooms Act*, the Department has a representative on the Board. That representative, as a Board member, would have been provided with Board materials outlining the nature and timing of the approval for the new organizational structure. The departmental representative did not attend the September 21, 2018, board meeting.

A meeting was held between Mr. Brinton and the Executive Committee on Monday, September 24, 2018. The purpose was to discuss the events of the previous Friday and to make arrangements for a full Board meeting. He stated that there was much concern about the Board's and the CEO's options at this point. They were given what they believed to be a lawful order by the Minister. The Minister has significant input to The Rooms' budget and he feared there might be a negative impact on their finances if the Board and the CEO tried to thwart the Minister's wishes. It was decided that in addition to the new Executive Director of Marketing and Development position, the Board would request that the current position of Director of Galleries and Museums would be elevated to an executive level. By doing so, the Board and the CEO would be acknowledging the long recognized importance of the position. It would also allow it to have a second-in-command to the CEO.

A full Board meeting was held by teleconference on September 27, 2018. The two new executive level positions were approved. It was at this meeting that Mr. Brinton advised all Board members that Ms. Foote would be the new Executive Director of Marketing and Development. They would have known or assumed that the incumbent in the Director of Museums and Galleries position would be placed in the new executive position for those functions.

Mr. Brinton subsequently signed the contract hiring Ms. Foote. He also signed the Request for Staffing Action Form for Ms. Foote's position and one for the new Executive Director of Museums and Galleries. Both of those are attached as **APPENDIX H**.

Mr. Brinton stated that he had a meeting in October 2018, with the Deputy Minister and a communications officer from the Minister's Department. The purpose was to draft a response

to the criticism government had been experiencing as a result of Ms. Foote's hire. It was anticipated that Mr. Brinton would sign this response. At this meeting he indicated that he would not respond on behalf of government as the decision was government's and they should take responsibility for it. He indicated to the Deputy Minister that he would not make public comment about this issue.

The Rooms, as an institution, is highly respected nationally. Mr. Brinton is of the view that its reputation has been significantly undermined by the publicity surrounding this issue. He also thinks that the major donors to The Rooms may be reconsidering their philanthropic endeavors, and it is unlikely that The Rooms will receive as much funding as in the past. Further, staff morale has been hurt by these events. The mechanism for hiring Ms. Foote at The Rooms was unprecedented and has undermined confidence in The Rooms as an independent institution.

The Board

By Order-in-Council dated March 8, 2018, six individuals were appointed to the Board of Directors of The Rooms and two were reappointed. Margaret Allen was appointed as Chairperson. Subsequently, Earl Ludlow was appointed Vice Chair and Katherine Hickey, Chair of the Governance Committee. The three formed the Executive Committee of the Board.

We interviewed the three members of the Executive Committee individually. Not surprisingly, their evidence was remarkably consistent. Ms. Allen had the most detailed recollection of events and was able to provide documentation which supported that recollection.

Ms. Allen stated that shortly after her appointment she had a meeting with Minister Mitchelmore. It was an introductory one and the issue of the vacant Director of Marketing and Development position was discussed, but only in a general way.

The primary human resource issue the Board was concerned with during the spring of 2018 dealt with the Director of Museums and Galleries position. It was felt that the position's salary was classified too low. While the Director of Marketing and Development position was vacant, Ms. Allen felt that the CEO, Dean Brinton, may have someone in mind to fill it.

Ms. Allen recalled receiving a telephone call from Mr. Brinton on a Friday, in May or June, advising that he was ordered by Minister Mitchelmore to rescind a temporary contract he had negotiated to fill the Director of Marketing and Development position. He was quite agitated and said that the decision will reflect poorly on The Rooms.

Ms. Allen stated that she and Earl Ludlow had discussions with the Deputy Minister in early September in which he indicated that an appointment for the Director of Marketing and Development position was imminent. Shortly thereafter, she and Mr. Ludlow were attending a function at The Rooms after which they hoped to meet with Minister Mitchelmore and the Premier, who were attending a different function, to get more detail. They did meet the Minister and the Premier, but did not obtain any information on the pending appointment. An Executive Committee meeting was held on September 12, 2018. One of the minutes for the meeting states:

An update was provided on the vacant Director of Marketing position. Following the revocation of employment contract to fill this position by Minister Mitchelmore in June 2018 the Minister and DM of TCII had instructed the CEO to prepare for the appointment of a government employee to this position, an idea first mentioned to the CEO by Minister Mitchelmore in the spring of 2018. The CEO has not been told who this individual is and has no knowledge regarding their qualifications or experience.

A Board meeting was held on September 21, 2018. A new organizational design for The Rooms was discussed and approved. It provided for a Director of Marketing and Development position to be classified at HL 24. After the meeting the Executive Committee met with Mr. Brinton in his office. He received a call from the Minister and the Deputy Minister. The Executive Committee stepped out of the room. When they returned they were advised that the Minister and the Deputy Minister had said that the Premier had offered Carla Foote the position of Executive Director of Marketing with The Rooms. This was the first time that any members of the Executive Committee had heard Ms. Foote's name in association with that position. Shortly thereafter, she received a call from the Deputy Minister to see if the Board was onside with the decision. It appeared to the Executive Committee that the decision was a fait accompli. Ms. Allen says that she told the Deputy Minister this was a bad idea and that it would have negative repercussions for The Rooms. The Executive Committee felt that there was little they could do given that the Premier had made the offer to Ms. Foote.

On or around September 24, 2018, Ms. Allen and Mr. Ludlow met with the Deputy Minister. They noted that the position was filled without competition. They said that while the prerogative of the executive branch of government to appoint whomever they wish to executive positions had been exercised in the past, this process at The Rooms was unprecedented. She indicated that the full Board would have to meet again to approve the appointment.

Another meeting was held on September 26, 2018. In attendance were: Ms. Allen; Mr. Ludlow; the Minister; an Assistant Deputy Minister; the Deputy Minister; and Mr. Brinton. Ms. Allen said that the Board felt that if the Marketing and Development position was to be elevated to an executive one, then its concerns with the salary of the Director of Museums and Galleries position being classified too low could be addressed at the same time.

A Board meeting was held by teleconference on September 27, 2018, to approve two new executive positions at The Rooms. A minute from that meeting reads:

On September 21, 2018, following the adjournment of the Board of Directors meeting, the CEO was informed by the Minister and the Deputy Minister of TCII that Carla Foote would be joining The Rooms in the role of Executive Director of Marketing and Development. Given that The Rooms has wanted an executive level position in the area of Museums and Galleries for some time now, the CEO and Executive Committee requested that a second executive level position be created. The CEO agreed to seek Board approval for these two executive level contracts. He also pointed out that the Executive Director of Museums and Galleries would be serving as the Deputy CEO in his absence.

During October and November, 2018, Ms. Allen and Mr. Ludlow were engaged with this issue. They retained legal counsel to assist them on how best to proceed. They were advised that while the decision of government may have breached a number of best practices, it was not illegal. Legal counsel advised that the Board had to move forward and find a way to work collaboratively with government.

The Executive Committee was adamant that the Board would not defend, in public, the decision to hire Ms. Foote. It advised all members of the Board to direct any media inquiries to the Minister's office.

In the fall of 2018, Ms. Allen and Mr. Ludlow had a meeting with the Clerk of the Executive Council. They were hoping that they could find a path that would lead to Ms. Foote being reappointed somewhere else within government. They were advised that there was no going back on the decision. They were counseled to find a way to work productively with government in the future and to put this issue behind them.

After some logistical difficulties, a meeting was held on December 12, 2018. In attendance were: Ms. Allen; Mr. Ludlow; the Minister; the Deputy Minister; Bradley George, Executive Assistant to the Minister; and Mark Browne, Parliamentary Assistant to the Minister. Ms. Allen indicated that they wanted to articulate the ways in which this appointment negatively affected The Rooms. The Rooms' staff were upset; donors and volunteers were threatening to withhold their money and time; and the negative publicity was politicizing what should be a non-political institution. As the meeting progressed, it became clear that the decision on the appointment would stand.

The Deputy Minister

Ted Lomond, the former Deputy Minister of TCII, was the Deputy Minister for that Department at all times material to this investigation.

Mr. Lomond was unaware of any formal written operational or ethical guidelines for Deputy Ministers outside of their employment contracts and overarching statutory obligations. While the Executive onboarding process covers issues like social media, to the best of his knowledge, there is no Code of Conduct for Deputies similar to those of MHAs, House of Assembly service members, statutory officers and their staff.

With respect to the hiring of Ms. Foote, Mr. Lomond does not believe he was the first one to talk to Dean Brinton about filling the vacant Director of Marketing and Development position. It would have been the Minister, in or about March 2018. The Minister mentioned to him that he had discussed the matter with Mr. Brinton about a candidate for The Rooms. Mr. Lomond subsequently called Mr. Brinton to ask if there was an office ready for the employee because he got a call from the Cabinet Secretariat saying there would be a move happening soon, and to make sure there was an office and phone line ready. The Minister had mentioned the matter to him, but there was no call to action on his part until an Assistant Deputy Clerk (ADC) in the Cabinet Secretariat called. This ADC handles all executive appointments.

Although he didn't know the identity of the candidate, he surmised, based on experience, it was someone slotted to move. He surmised it was someone in the system already as Cabinet Secretariat would not be involved in a new outside hire. He summarized this period as a series of "hurry up and waits," meaning the issue wasn't being addressed constantly.

Mr. Lomond recalled that Mr. Brinton would have e-mailed him a couple of times asking if he had any news about who was to fill the position. He told him that he didn't and that he would be best served by talking to the Minister or Cabinet Secretariat. Conventionally, executive appointments take place quietly in the background until the announcement is formally made. Doing otherwise would create speculation in the system, especially in cases where people don't end up being shuffled.

Mr. Lomond described the organizational review of The Rooms as having previous versions, and being "on the go" for some time. When he was shuffled from TCII to the Department of Natural Resources as part of a wider series of appointments in January 2019, the review had still not been through Treasury Board. The organizational review taking place at The Rooms would not have been a priority of his. It was something that would involve Treasury Board and the CEO as a deputy minister equivalent. TCII provides policy support to The Rooms; however, "we don't oversee their organizational structure or anything like that."

Mr. Lomond said it was unlikely that he had any dealings with the Board or CEO prior to any of the Board meetings on the subject of an actual named candidate coming on board. If he was told about upcoming changes he had a duty to keep the matter quiet until it was ready to go.

On the day of the appointment, he recalled going into the Minister to say he had word there was an executive shuffle happening. By that time he knew it was going to be Ms. Foote and he was asked by Cabinet Secretariat to notify the people who needed to be notified. He and the Minister telephoned Mr. Brinton. He described about five minutes of pleasantries taking place between the Minister and the CEO, at which point Mr. Lomond interjected on the call to ask if Mr. Brinton "was in a tunnel or something." He felt there was something not right about the call and was told the CEO had them on speakerphone with certain Board members there. He did not believe this was fair to the Minister and felt Mr. Brinton should have told them others were in the room before the Minister discussed things like his recent holiday. He was unsure if they were placed on hold or if the call was terminated briefly; but the call continued after the Board members had left the room.

With respect to the letting of an employment contract to another person in advance of Ms. Foote's hire, Mr. Lomond remembered on that specific day he was attending management team meetings at the Arts and Culture Centre. He received a call from Cabinet Secretariat asking him to confirm with Mr. Brinton that there was an office and a phone ready. He informed the caller that he had already done so and the necessary accommodations were ready, but he would do so again. During the ensuing call Mr. Brinton advised him that he had hired someone and that the Minister told him he could do so. He called to check with the Minister who told him he did not give Mr. Brinton permission to hire someone. Mr. Lomond asked the Minister if it was possible that he signed a Request for Staffing Action Form and didn't notice, and he was told no. Mr. Lomond called Mr. Brinton and relayed that the Minister said he couldn't fill the position. Mr. Brinton replied to the effect that he and the Minister had

discussions and the Minister hadn't said no, and that the Minister had indicated to him that it (the position) had to be filled soon. Mr. Lomond went back to Cabinet Secretariat with this information and was told to ask for a copy of the signed contract.

Mr. Lomond requested a copy of the contract. He relayed the contract to Cabinet Secretariat which relayed it to the Department of Justice and Public Safety. He knew that the contract was still within the notice of termination time frame, but the timelines were extremely short. He asked Mr. Brinton if Strategic Human Resources had looked at the contract and he replied that they didn't have to. Mr. Lomond disagreed with that statement and asked if Mr. Brinton had a Request for Staffing Action (RSA) signed. Mr. Brinton said no and that he would do so. Mr. Lomond advised Mr. Brinton he could not let a contract and then seek authority. Cabinet Secretariat called the Deputy and he confirmed that Mr. Brinton did not have a signed RSA; the contract had not been reviewed by Justice as required; and he had not engaged Strategic Human Resources. The contract would therefore have to be rescinded. It fell to Mr. Lomond to relay to Mr. Brinton that he would have to rescind the contract. Cabinet Secretariat sent over a letter for signature for Mr. Brinton to use as a template in rescinding the contract. Mr. Brinton mentioned that the rescission was a lawful order by the Minister so he had no choice but to do so.

Because he was at the Arts and Culture Centre on the day in question it is entirely plausible that his Executive Assistant would have sent the template letter to Mr. Brinton, as she could do so from the Deputy's e-mail account. He kept the Minister apprised of these developments as they were happening. Both the Minister and Strategic Human Resources were saying the contract was invalid and unapproved. The Minister signs every RSA in the Department from executive to front line positions.

On the issue of deletion of e-mails, Mr. Lomond stated that his Executive Assistant had come from the Office of the Chief Information Officer and was pretty rigid about information protection. During the period when Ms. Foote's hire was ongoing "I talked to Mr. Brinton a number of times and I said to him that in light of everything that is happening I would suggest you delete your transitory records." Mr. Lomond's concern was that transitory records can be misconstrued. He cited an example to Mr. Brinton of one media outlet using them to form a narrative from disparate conversations over e-mail that wasn't accurate. His Executive Assistant would have issued a similar reminder to Mr. Brinton's Executive Assistant in this vein; not an order to delete records, but a request to delete transitory records. If Mr. Brinton's Executive Assistant got the impression that he ordered the deletion of an e-mail that was not a transitory record, then it was a misunderstanding. He did not instruct his Executive Assistant to tell anyone to delete records. Mr. Lomond stated that... "you knew this was going to get ATIPP'd....so I would like to have my records neat and tidy, final versions lined up." He stated he didn't have the authority to tell the personnel of The Rooms to do anything. The Rooms personnel do not report to him and all he could do as a colleague was to offer advice. Over the years he has seen a number of colleagues go through a lot of stress and embarrassment over a flippant remark on something that was a transitory record. Mr. Lomond said "you are not supposed to be tying up room on the server; you're not supposed to use your e-mail as a filing system." When Mr. Brinton told him he was not deleting records Mr. Lomond said "fine, keep the records, but if it doesn't meet the definition of a record, we're not keeping ours."

When asked about any role the Premier had in the hiring of Ms. Foote, he stated that Ministers do not telephone executive appointees at high levels and offer them jobs. Rather, it requires the concurrence of Cabinet Secretariat and their political masters to make those sorts of decisions. He could not confirm if a communication had taken place between the Premier and Ms. Foote, but it would not be uncommon for a Premier or Chief of Staff to approach someone rather than just make an announcement about an executive appointment. As far as he was concerned, by the point it reached his attention, it had all been agreed to. He understood that Ms. Foote was excited by the opportunity to put her marketing skills to work as opposed to the communications skills she was employing in her previous role.

Later, after the appointment had taken place, TCII held a meeting with the Board Chair and Vice Chair on the subject of the relationship with The Rooms. The objective was to discuss how the two organizations could move forward in the wake of the appointment and the integration of the new candidate into the organization in an environment of tension. The Board representatives stated the Board was feeling pressure and The Rooms had lost a volunteer and were going to lose a large donor. Board members were concerned about negative attention on a national scale after local media attention, and Mr. Brinton was unhappy. Board representatives explored the avenue of reconsideration of the decision, but were informed by the Minister that the decision would not be reversed. The conversation then drifted toward how to repair the relationship and move on. His assessment was that the relationship between the Minister and Mr. Brinton was not where it needed to be.

Mr. Lomond did not recall seeing a position description for the Executive Director of Marketing position. He believed they were freezing the unfilled existing position and using those dollars toward the new one. He stated the new position was probably broader in scope, but he could not confirm this. He would review position descriptions for ADMs in his own department, but his responsibilities did not include reviewing similar ones for The Rooms.

Mr. Lomond had no involvement in setting the salary for Ms. Foote or the selection of Ms. Foote for the position. It is not uncommon when one executive moves to another position that they carry their salary with them.

Mr. Lomond stated that he had 11 entities under the ambit of TCII. They were at arms-length and none of them were considered core government; but they were not geared up to be policy-generating units, so inevitably policy support would have to be provided by the Department.

The matter generated a fair bit of media reaction and for the people involved it was tense. He expressed empathy for the Board who signed up for Board responsibilities, but were dragged into something else that was not part of their orientation.

It's not uncommon for people to complain about executive appointments. He knew the hire of Ms. Foote would attract significant attention. It got more attention than anticipated. It appeared to Mr. Lomond that someone was providing information to the media and Ms. Foote's prior career as a media professional may have led to wider and deeper scrutiny of the appointment. He is unsure what, if any, impact it will have on The Rooms in the long term.

He summarized his primary involvement in the entire matter as a "buffer" relaying messages to Mr. Brinton from the Minister and Executive Council. He stated the matter was not something

he concocted in the corner of his office. There were a number of moving parts involving other government entities.

The Assistant Deputy Minister

The ADM of TCII was interviewed. She is the “tourism and culture person” in the Department. She has a wide responsibility across several different departmental fields of interest, including several arms-length entities of the Department. There is a natural relationship stemming from TCII’s mandate in preserving the province’s history, culture, arts and heritage, and the operations of The Rooms.

She stated the Deputy Minister was on the Board of The Rooms for a period of time, but asked her to replace him as her background and job requirements were more in tune with The Rooms’ operations. As ADM she is permitted on the Board pursuant to the *Rooms Act*. She attended her first board meeting in January of 2018.

The ADM described a strained relationship between The Rooms, notably the CEO, and the Department, including previous Ministers in previous administrations. Both the Department and The Rooms had undergone budget cuts in 2013 and there was a lot of lingering resentment. However, their teams, which interacted at various levels, worked well together.

As TCII representative on the Board she would be required to meet quarterly. She described the reporting relationship between The Rooms and government as “foggy.” The CEO is a Deputy Minister equivalent who does not report to the DM or ADMs in TCII, but rather to the Minister. The Minister can’t get involved in the day-to-day interactions of The Rooms’ personnel with government, of which there are many. So, it fell to the Deputy Minister of TCII to be the messenger between the two entities. Her job, as she saw it, was to assess and work on where the two entities intersected; to talk about shared programs; and bring information and updates from TCII. There was a lot of crossover.

If there were problematic, public, or legislative issues, the Department was generally in the position where it was heading the response or the initiative. The expectation over the years, predating the issue under investigation, was often that as ADM of Culture she would help in communication or issues management for The Rooms if matters arose in the House of Assembly, the media, or in the wider public purview. She described her initial reception as the TCII representative on The Rooms Board of Directors as positive.

With respect to the vacant marketing and development position, the ADM stated that following the 100 Year Anniversary of Beaumont Hamel in 2016, the marketing person resigned for another opportunity, leaving a vacancy. Prior to the issues arising in 2018, her only recollection about the job was that she was contacted by a man with a marketing background in government who wanted to learn more about the job and asked some questions.

Realignment of the organizational chart at The Rooms was somewhat problematic as it was commenced with a view to the anticipated reform of the *Rooms Act*. However, implementation of the new *Rooms Act, 2016*, stalled and the statute went unproclaimed in the wake of backlash from stakeholders who felt they weren’t adequately consulted. A 2017 Minute-in-Council

advising the staff of The Rooms on how to proceed was followed, and so work began anew on an organizational review in 2018.

The ADM had no knowledge or involvement in the temporary contract let by the CEO for a Director of Marketing in June 2018.

She first heard of Ms. Foote's name on September 21, 2018. There was a Board meeting scheduled for that day. She was contacted by the Deputy Minister on September 20, 2018, to see if she was going. She wasn't sure if she was going and the Deputy Minister said he would call her the following day. He told her in confidence on September 21, 2018, that the CEO and Board would be notified of the appointment of Ms. Foote as an Executive Director for Marketing at The Rooms. The ADM, now in receipt of confidential information, opted not to attend the Board meeting. The appointment had nothing to do with her; the matter was being managed at the Minister/Deputy Minister level, so she did not feel she could attend in good conscience knowing about the pending appointment.

With respect to any reputational harm to The Rooms by the appointment, the ADM stated she is a pragmatist. She generally took the position that senior managers like her are assigned orders by people who were elected by the voting public. So, if you receive orders, you accept them; get behind them; move on them; and try to make them work; and if you can't accept them, you have to move on.

On September 26, 2018, there was a Board meeting which paid particular focus to the organizational chart. There was a new position in the organization, a person elevated from below to manage galleries and museums. She did not feel it should have been elevated, nor did the Human Resource Secretariat; but it was the will of the Board, and the CEO was happy to have it elevated.

The ADM felt that Mr. Brinton was initially supportive in meetings with TCII and the Board about Ms. Foote's appointment, and he was especially happy that the position for museums and galleries was being elevated to an executive level.

The ADM felt that the new Board, and especially the Chair, handled the matter very well.

Beyond the September 26, 2018, Board meeting, she was only involved with helping the Department to prepare anticipated responses to media inquiries and questioning in the House of Assembly.

The Minister

The Honourable Christopher Mitchelmore is the Minister of Tourism, Culture, Industry and Innovation and the Minister responsible for Francophone Affairs. He is the Member for the District of St. Barbe - L'Anse aux Meadows.

Minister Mitchelmore was first elected to the House of Assembly in 2011 and was re-elected in November 2015. He is from Green Island Cove, a small fishing village on the great Northern Peninsula.

Minister Mitchelmore has a Bachelor of Commerce Honors (Co-op) degree from Memorial University, with international study experience in the United Kingdom and at the University of Economics in the Czech Republic. He worked with the Department of Innovation, Business, and Rural Development, the Newfoundland and Labrador Board of Commissioners of Public Utilities, and London Offshore Consultants.

Prior to entering politics, Minister Mitchelmore worked as a client services officer and a youth ventures coordinator with the Community Business Development Corporation. He has an extensive track record of community involvement, including time as Vice President of the Straits-St. Barbe Chronic Care Corporation and director and member of the Canadian Community Economic Development Network. He was appointed Minister of Business, Tourism, Culture and Rural Development on December 14, 2015.

The purpose of the interview with Minister Mitchelmore was to provide him an opportunity to respond to the allegations and the evidence that had been forwarded to his solicitor. In fairness to the Minister and to avoid any mistake in recording his responses, we chose to reproduce many of his responses to our direct questions.

The Minister highlighted a number of factors that gave context for his interview. In March 2018, he had a discussion with Mr. Brinton after there was a significant amount of negative publicity and a human rights complaint about a Request for Proposals for the Agency of Record with The Rooms. The RFP ended up containing some language about Muskrat Falls which created a real stir. There had been some activity around filling a vacancy for a Director of Marketing and Communications that was cancelled in 2016. It was a competitive process through the Public Service Commission (the PSC), with applicants being screened in and interviewed, but no one was hired.

In 2016 there was a discussion with Treasury Board about organizational review, some redundancies, and the old *Rooms Act*. There was to be some consultation and a process to follow pursuant to the government's advancement of the new *Rooms Act*. Consultation was required to proclaim the legislation and it was important for the stakeholders to communicate what they perceived as their future and where they saw The Rooms in it. Mr. Brinton conducted some consultations, but advised people afterward that it wasn't actually about the *Rooms Act*. So then a consultation was announced and held that Mr. Brinton would not participate in, which led to the Minister having to give the presentation or consultation in 2017.

Later in 2017 the Director of the Art Gallery resigned. Mr. Brinton proposed that two director positions be merged with savings put into programs. In September a Director of Museums and Galleries was hired. The Request for Staffing Action Form reflected a higher pay scale under the contract. The Minister had some misgivings about this and sought advice from Human Resource Secretariat. By March of 2018, with no one serving in the marketing/communications role, the Minister was in a position where Mr. Brinton was not responding to media. The Minister advised him he should look at filling the vacant position and that there would be adequate, qualified individuals within core government, given that government had gone through a flatter, leaner process and there would be a surplus of good candidates as a result of redundancies. The Minister explained that unlike ArtsNL or Marble Mountain, for example, that have Boards of Directors, he has to sign all staffing actions for The Rooms. This is unique, but

has always been a requirement. HRS would work with Mr. Brinton about hiring and the staffing action would come to the Minister for signature.

In a March 2018 telephone call, Minister Mitchelmore did not advise Mr. Brinton to go out and hire a Director of Marketing and Development. He did tell Mr. Brinton he believed there was somebody in government that could serve in this role. He advised the new Chair of The Rooms Board of the same thing in mid-March 2018. He had highlighted that he wanted to see a better relationship and synergy with The Rooms, and that the new role was a gap that needed to be filled.

The Minister learned and was concerned by the fact that the previous Board had granted Mr. Brinton permission to work 12 weeks in Nova Scotia. However, he felt the matter was best dealt with at the Board level and would not get involved.

The Minister stated that Mr. Brinton had lobbied for the re-appointment of the previous Board Chair, but that person had not been re-appointed. Therefore, there was a domino of effects that has been happening with Mr. Brinton that has led them to this point. He was advised that his position would have to go to the Independent Appointments Commission when his reappointment was due; however, Mr. Brinton would vacillate between wanting his contract renewed and leaning toward retirement.

When asked the direct question “did you have anybody in mind when you spoke to both the CEO and the Chair in March (2018) for this particular position”, the Minister stated:

I’ve answered that question stating that I’d not, I did not state, any name or individual to the CEO, it’s, it’s his responsibility to be able to go out through that process to the advice that I had provided that there was somebody within government that he could hire to fill these marketing needs within The Rooms.

The Minister could not speak to any conversations that the Deputy Minister would have had with Mr. Brinton about getting ready for a new Director of Marketing and Development. He was surprised that Mr. Brinton would not engage with him personally in the process because the CEO reports to the Minister, not the Deputy Minister of TCII.

When asked when he became aware that Ms. Foote might be a candidate for this vacant position, Minister Mitchelmore stated:

Well, that process of the reorganization of the *Rooms Act* was going through an HR process and it was identified that The Rooms really needed somebody of high quality and high caliber...to meet the needs of communications, the synergies of government and it was certainly felt that Ms. Foote would be the best person to serve in that role. There’s always opportunities for lateral moves within government. We see quite regularly where people get appointed to be Deputy Ministers. On January of 2019, there were nine people, I believe, appointed to various positions...either from ADMs or other roles that were elevated so they would receive increased pay and they would not have received competitions. That, as well, would have created a domino effect where people who served in directors or other capacities would have been elevated to be ADMs, so Ms. Foote served as the

secretary, the corporate secretary for communications which would be the equivalent of an assistant deputy minister position so there was a lateral transfer to The Rooms to serve in that role and to be able to take that talent that she offered at core government to The Rooms to be able to fulfill that need. No different than (name withheld) who had been serving in the role of Director of Museums and Galleries. She was appointed permanently when The Rooms Board approved those positions in September, I believe the 27th the minutes would reflect that. The conversation was had, I believe, with the CEO in September that Ms. Foote would be transferred to The Rooms...later in September.

When asked to relate the process leading up to September with respect to the appointment to the position, Minister Mitchelmore stated:

This has been quite ongoing for some time when it comes to the hiring process for this particular position. I think one of the things that came up during this particular process is that the CEO had... and when I became aware of it... it's a matter I had to deal with, he had gone out to hire somebody without any type of particular competition, without any type of engagement through HRS; not following the policies and procedures of government for any particular hire to fulfill the role of Director of Marketing and Communications starting in April, May for an individual and offered basically an invalid contract that was...not valid.

He described his role in the rescission of the contract:

So the contract wasn't valid...I became aware of this matter through the Deputy Minister who had advised that the CEO had extended a contract to start, I believe sometime in July, to fulfill this role and there was no engagement throughout this whole process. No engagement with HR, no discussion with me. I had advised him just a month prior that I felt that he should seek within government someone who is qualified to fulfill the role of marketing and communications. Obviously, the CEO did not do that, he went out to seek somebody in this particular role through what I believe would be a sole-source process as well...When I became aware of it, it was something I had to deal with because it's my understanding that the Deputy Minister and him had an exchange and the CEO had at that time basically advised that, well, he doesn't answer to the Deputy Minister so I'm surprised why he's engaging in that particular process. So as Minister I had to contact The Rooms CEO and I advised him that he had to rescind the particular contract because it wasn't valid.

When asked for a response to the fact there were allegations that the rescission of the contract to A.B. was done to clear a path for the appointment of Ms. Foote, Minister Mitchelmore replied:

I don't have a particular response to that because the CEO was engaged in a process where he should have looked towards internal government to hire somebody in this particular role. He did not...And the role he was hiring for was a director of marketing and communications. The role Ms. Foote has is an executive director. It is an equivalency to an ADM. Not a director role. These are two separate matters.

When asked if there was anything he could say about the rationale and the decision-making process that eventually led to Ms. Foote getting hired, the Minister replied:

Well, the process of executive hires and transfers are very common practice in government and when it came to The Rooms, The Rooms is a crown entity. There are people who are moved and transferred to various positions based on that process. I can cite examples of the WorkplaceNL where the Deputy Minister, for example, (name withheld) was transferred to be the CEO of (WorkplaceNL)... So she was the Deputy Minister of Business and she was transferred to be the CEO of WorkplaceNL. She served in that role until she was replaced through an independent appointments process.

When questioned about why the appointment didn't take place through the Order-in-Council process, where one can track online the movement of executives through government, Minister Mitchelmore advised:

I'm not familiar with the process for HR and who determines these particular Orders-in-Council through that particular process. Like, I don't make an Order-in-Council as a Minister.

When asked again about his role in the process, Minister Mitchelmore stated:

Well, whenever a request for staffing action comes to a Minister it goes through a process. It is signed off by the senior head of the entity whether a Deputy Minister or CEO. So as Minister I review these request for staffing actions, whatever the position is for. These are contract positions so they are not for an infinite period of time. They are appointments at an Executive level and when I agree that these people are qualified to serve in these roles based on what is put forward I sign off on them...I have no issue with (name withheld) serving as Executive Director of Museums and Galleries. No more do I have issue with Ms. Foote serving as Executive Director of Marketing and Communications because these people are eminently qualified to do these roles. Within government there's always transfers. And from a point of view, there's no public record that goes out to say these people were appointed as Assistant Deputy Ministers. They don't go out in news release. It's Deputy Ministers that do. And when this was made, I guess, there was a position where the role was filled that Ms. Foote had held, Manager of Communications and Marketing for the core of government, it was asked at that point by the media, "where, what happened to Ms. Foote?", (a member of the local media tweeted it out that she went to The Rooms) and there was no particular issue on these transfers because they happen on a....it's a normal process within government. And I would state that the regular process for HR was followed when it came to creating these positions, classifying them, signing off on them for both of these individuals. I know that we are talking about Ms. Foote here but I think it's very important to understand that, as Minister, I take my job very seriously when it comes to the roles and responsibilities that I have to the Crown and to the province. And I've been reviewing a number of matters with The Rooms and I've been trying to fix some of the issues...this is why I've been trying to work with the CEO to meet the needs of

The Rooms so it can be more flexible by creating this particular Bill. The Rooms CEO had actually presented an organizational chart to me that included the creation of VPs for every position within his division and creating a number of high level positions. These are all things that were put forward by the CEO himself.

When asked about an alleged direct order from him to Mr. Brinton to sign the Request for Staffing Action Form authorizing the hire of Ms. Foote, Minister Mitchelmore stated:

The CEO, it would be under his own obligation to sign any particular request for staffing action. My contract is not with the CEO. The contract of the CEO is with the Board. And the CEO's position, he is answerable to the Board...

...And for any particular hire to occur at The Rooms there would have to be a request for staffing action placed there, signed by the head of the department the CEO and also signed by me. And I think that that's really important because it is unlike other positions, other Crown entities within government. I would not be able to create a position or sign off on a staffing position for ArtsNL for example to create or hire an executive director or any other position within their department, and manage wholly their operations and their positions and their staffing and they are run by a Board of Directors. I know that it seems very unusual that such an entity like The Rooms which we provide a grant of about six and a half million dollars to, would require Ministerial sign-off on all positions and having a Board of Directors. But that has been the process since I have been there as Minister, and well before I've been there. This has been the process ever since The Rooms Corporation has been created.

When asked about the peculiarity of the timing of the Board's approval of a new organizational chart with a Director of Marketing and Development (not an executive director), with a pay scale of roughly \$70-90,000 being approved on September 21, 2018, and then Mr. Brinton received a call the same day stating that Ms. Foote would be appointed to The Rooms as an Executive Director of Marketing and Communications, Minister Mitchelmore replied:

What I can say is that the chart that would have been presented, I didn't see these particular matters as I wasn't part of the Board meeting or what had been there, what had been presented to them. But the discussion has been, for quite some time, is around the, by the CEO in particular, the need to have an Executive Director for Museums and Galleries for (name withheld) given the reflective new structure of the organization, the role and responsibility and given that that she's been receiving these salaries since September 2017. So the decision was made to create two executive level positions for these individuals Ms. Foote and (name withheld) and to receive comparable pay and compensation. Ms. Foote was being transferred from core government in an equivalent ADM position to the equivalent ADM position as an Executive Director within The Rooms, receiving the same pay and benefits. There is no increase in her salary. We have a number of individuals that transfer throughout departments, I have an individual within my own department that served as a Deputy Minister previously and now she's an Assistant Deputy Minister and she's receiving more pay, she was receiving more pay than the Deputy Minister

for a period of time and so she is not remunerated down for the workload that she is doing. These are common practices within government and, you know, that is consistent with HR as to how people are either red circled based on their roles and responsibilities. So these were the positions that were created to serve in that capacity. Reflective of the need and reflective of the experience level that's required and the work that would be transpired not just from museums and galleries and the increased workload but given that The Rooms had a new strategic plan that they're focused on forward facing programming like their cultural ambassadors, they are a reflection outward of the community and how they need to revamp their membership program and all the other initiatives from a marketing and development point of view it was reflective and felt that Ms. Foote would be the best person to be appointed in this particular role to serve as the Executive Director....

When asked about the remuneration level approved by the Board on September 21, 2018, for the Director of Marketing versus the new Executive Director position, and whether the \$132,000 salary for the new position seemed excessive, Minister Mitchelmore advised:

I don't believe that the pay would be deemed excessive. An individual who is receiving a role, and with the experience that she has, 20 years in the industry and serving in government for three years in this particular role, this was the salary that she was earning, she did not receive an increase in pay for being moved into a particular position. And The Rooms Board had no issue with approving the executive level position. In fact the CEO had been lobbying for quite some time to have not just one executive level created for (name withheld) but executive level positions created for all his particular staff because he felt that the positions warrant VP status for the corporation and the entity to have additional pay. So the responsibilities that were being undertaken by Ms. Foote is comparable I believe and the work that she's going to do will do incredible work, or anybody else who serves in that particular position.

But I want to point out that I did not direct the Board or anybody else to set the salary to be what Ms. Foote is paid. So I want to be very clear about that, that I did not set the salary for Ms. Foote to be at \$132,000 a year...

I believe how it occurred is that the request for staffing action reflected that Ms. Foote is in a salary band, this is what her pay is currently, and when it was signed off by the CEO, and by myself, that would have set forth what the salary would have been. It would have either followed HR practices, I'm not involved with HRS or any of the particular matters as to what salaries would be for any particular individual but all I am saying is that I did not determine that Ms. Foote's salary was going to be \$132,000. What I'm saying is, is that I had individuals that had served in other roles, in Deputy Minister roles, within my department, that is now been moved to Assistant Deputy Minister but is receiving a Deputy Minister pay.

With respect to the Request for Staffing Action Form and the incomplete section on "Rationale for Staffing", Minister Mitchelmore stated:

I can't explain why that isn't complete. It certainly should have been complete and I review requests for staffing actions on a very regular basis no different than many other documents that I review. It's quite regularly that I catch matters of either spelling errors or other things. In this particular case I guess it's something I didn't see as being left blank. I had signed it. The CEO had signed it. And this would have been something that I expect those that are filling out and completing these forms...I never complete any of these forms as a Minister. It wouldn't be my role to do so. I review them. I would expect that all the people who would have been dealing with that would have completed and filled in all the appropriate details. But given the position and the discussion that happened around the reorganization, around the dialogue with the CEO, and the Board chair, about these executive level positions, we had discussed what these positions would entail, what the workload would be and the reflectiveness and the nature of it, so I had known what roles and responsibilities Ms. Foote would play or any other individual that would have been on that request for staffing action. I don't think I would have noticed either, I may not have noticed, if (name withheld)'s request for staffing action that came in that was also approved at the same time, if it was blank. But since that time and since this has become aware I certainly do a much more thorough review of requests for staffing actions because it is my responsibility to make sure that things (are) in a correct manner and a correct form and it's certainly something that I have taken great heed to, to make sure that these matters are complete and have directed my staff, my Deputy Minister and others to make sure that things are done and reviewed appropriately.

On the subject of the allegation of instructions from his Department to staff of The Rooms to delete e-mails on June 15, 2018, Minister Mitchelmore advised that he didn't know anything about it, and he certainly didn't direct anybody to delete e-mails. He is the subject of frequent ATIPP requests and he likes to provide information that provides context when, in fact, the extent of the information he provides does not have to be released according to the wording of the request.

On the subject of any alleged reputational damage to The Rooms as a result of the manner in which Ms. Foote was appointed to The Rooms, Minister Mitchelmore advised:

I would say I have had a good working relationship with the new Board. I have set up regular meetings with the Board Chair. Unfortunately the CEO could not be available for these particular meetings and the (Executive Director for Galleries) has filled in in these roles. As well, for any number of public appearances I've done as Minister, attending The Rooms when the Board meeting has taken place, Board members have shown up but the CEO was absent at all of these particular functions and matters. I would say that it is certainly important, The Rooms is our most important cultural entity and it's something that is a part of all of us because of the repository of culture, artifacts and information that exist at The Rooms. And I think it's very unfortunate that this matter has been over-politicized in terms of Ms. Foote, because Ms. Foote is eminently qualified. She was serving in a core government department in a role. She was not a political staffer as has been reported by the

media. The media has been taking only one particular piece of this matter of Ms. Foote and not looking at all the information that had taken place including (Executive Director of Museums and Galleries) and the role that she has. And these people are doing incredible work and the Board of Directors is doing great work. I think if you met with the Board of Directors today and met again with the executive directors based on the actions of the CEO since you interviewed them they would probably have a different comment or conversation to say. And I say that because the CEO has certainly made, has taken action as a manager, to prove that in many cases he's acting insubordinately to his role. He has submitted requests for staffing actions for me to pay one of the directors in excess of his current salary when told not to by HRS. Additionally, there's been a position that he's been trying to create of corporate secretary whereas the Treasury Board has not approved these particular matters. And these are things the executive committee is having to deal with with the CEO. The comments that the CEO has made about Ms. Foote or myself individually has been very much uncalled for. The aspect that he has wanted minutes and his statements to be recanted at Board meetings. It's very questionable, the approach that the CEO has been taking on this particular matter. And I think all of this goes back to the whole situation in March with me asking him, stating that he had to publicly apologize for the matter of the (request for proposals) for the agency of record. Also then having a new Board Chair appointed and new Board members, especially ones that questioned his part-time Nova Scotia work for twelve weeks of the year if, if that's actually appropriate for a CEO to have that much time off. As well, the aspect that the Chair and the Board, in their meeting talked about succession planning and the process for appointing a CEO. So I think a lot of this series of events is causing the CEO to make decisions and take actions that are not necessarily in line with government, or in the best interest of the province, or the corporation. And as Minister it is my responsibility to look out for the corporation and this is why I've pointed out that I felt that we need to have somebody who is working within government to be able to connect with government because The Rooms, The Rooms touches not only my department of TCII, it touches the Department of Education with all their programming, there's lot of training and outreach to new Canadians through immigration, there's Indigenous Affairs, they have an artist in residence program, there's so many good things that's happening at The Rooms, but we're just not getting all that out there. The Rooms in many cases they just go and do things on their own. They had, they had last summer, raised money through their campaign, they donated five or fifteen thousand dollars to all these military families. Wonderful things. But the CEO had done this, and organized all of this, without even engaging government. He didn't want any government members to be there, made a visit to St. Anthony and didn't even have, and did it at a time when their Board member who was from St. Anthony could not be available. So there's a number of things that either, there's a whole stack of a lot of coincidences or there's a series of things that's purposely being planned and happening for a reason and you know I question the motives of the CEO in terms of how all of this is transpiring. Because I have been working very diligently to make sure that the Corporation of The Rooms is successful, that it has the resources, that it

has the supports, that it can deliver and we want The Rooms to be a successful entity of government. It has its challenges and if you interview staff at The Rooms you will hear lots of challenges. I know that's not the complaint here today. And my point, when it comes back to the Board of Directors is that I think that if you talk to somebody at a particular point in time, things change. And things have changed with the Board of Directors. I think things are going really well at The Rooms. We've a number of series of events. The art gallery for example with the seven exhibits that opened that the CEO was not present for, had 450 people attend. That was very successful. Our Artist in Residence program where we had the Deputy Minister of indigenous affairs, we had artists come in. We actually did a circle of dance, united around in The Rooms with the indigenous community and the arts community and others. And the Board members were there because this was when the Board was meeting, and the CEO was not present. I don't know what he was doing and maybe he has a legitimate reason for not being there, but all of these things highlight that the Board is very much engaged. The Board wants to be a part of The Rooms. They want to see it be successful and I think they certainly have accepted both (Director of Galleries) and Ms. Foote in these positions and I don't think they've accepted the fact that, at particular Board meetings, the CEO ignored Ms. Foote, did not allow her to present a report, there were accolades given to all the other executives that were there from staff. So I think the actions of The Rooms CEO will speak for themselves.

Minister Mitchelmore closed by saying:

Throughout this whole process, this is not the only issue or incident of HR concern with The Rooms in terms of how the CEO has looked at hiring and has been told, multiple times, about this. And HRS or those within government can certainly highlight where they have had issues or concerns with how the CEO approaches HR matters.

ADDITIONAL EVIDENCE

a) The Executive Assistants

One of the allegations we investigated was whether Minister Mitchelmore ordered staff of The Rooms to delete e-mail. It was alleged that on June 15, 2018, personnel from the Minister's office instructed Mr. Brinton's Executive Assistant to delete the e-mail from Mr. Lomond's Executive Assistant attaching a draft letter revoking the contract of A.B. We interviewed both Mr. Lomond's and Mr. Brinton's Executive Assistants, separately. Both individuals stated that Minister Mitchelmore did not give any direction to delete the subject e-mail.

b) Ms. Carla Foote

It is public knowledge that Ms. Carla Foote is the daughter of Judy Foote, the current Lieutenant Governor and a former federal Liberal cabinet minister. As well, Ms. Foote worked for the Liberal party while it was last in opposition.

A press release issued by Executive Council on January 14, 2016, announced, inter alia, that Ms. Foote had been appointed as Associate Secretary of Cabinet (Communications) with Executive Council (**APPENDIX I**). Her backgrounder states:

Carla Foote has served as Director of Communications in the Office of the Official Opposition for three years. She has spent the last 18 years in the communications sector working with public sector, not-for-profit and private industry. Ms. Foote has provided strategic communications advice to a variety of sectors from education and health care to Aboriginal groups, and the oil and gas industry. In addition to studying Political Science at Memorial University, she is a graduate of the Broadcast Communications program at the British Columbia Institute of Technology. Ms. Foote is a former executive member of the Canadian Public Relations Society - Newfoundland and Labrador, and a recipient of Rotary international's Paul Harris Fellowship.

c) The Human Resource Secretariat

We requested and were provided a copy of the instructions for completing the Request for Staffing Action Form from the Human Resource Secretariat (**APPENDIX J**).

We also summoned from the Human Resource Secretariat all documentation associated with the recruitment for the position of Director of Marketing and Development with The Rooms which was held in 2016. The volume of material we received in response was substantial. Attached, as **APPENDIX K**, is our summary of that material. Of note, 77 people applied for the position. The completion of an undergraduate degree in Business or Commerce (equivalencies would be considered) was deemed as mandatory. Forty of the candidates held Bachelor degrees, while 21 held Master's degrees.

d) The Joyce Report

On October 18, 2018, the Commissioner for Legislative Standards issued the *Joyce Report*. In it he found that a member of the House of Assembly, Edward Joyce, had violated section 10 of the Code of Conduct by submitting the resume of a friend to a ministerial colleague for a position that was posted pursuant to the *Public Service Commission Act*, and then continued to contact that colleague in attempting to have her influence the outcome of the job competition. The Commissioner found:

I do not think that MHA Joyce met the expectations of the Code of Conduct, that he perform his duties with "... accountability, courtesy, honesty and integrity". I think

his attempts to influence the Complainant's actions, as well as his response when she failed to affect his desired outcome, were outside the "norm" of political interactions and were below the standards expected of persons in their role within government. Relationships between Members and government employees should be professional and based upon mutual respect and should have regard to the duty of those employees to remain politically impartial when carrying out their duties.

I find that the conduct of MHA Joyce is a violation of principle 10 of the Code of Conduct. His behaviour during the hiring process fell below the standard expected of a member of the House of Assembly. I find that the manner in which he addressed this issue was unprofessional and showed a lack of mutual respect towards members of the public service by placing those individuals in the middle of a process that is supposed to be politically impartial. This type of conduct is not acceptable and must be discouraged.

We maintain that the findings of the Commissioner are a factual matter, albeit related to the specific allegations he was investigating. What, if any, weight we should place on those facts will be discussed in the findings section of this report.

THE LAW

Section 54 (1)(e) of the *House of Assembly Accountability, Integrity and Administration Act* defines wrongdoing. It states:

(e) "wrongdoing", with respect to a member, the speaker, an officer of the House of Assembly and a person employed in the House of Assembly service and the statutory offices, means

- (i) an act or omission constituting an offence under this Act,**
- (ii) gross mismanagement, including of public money under the stewardship of the commission, in violation or suspected violation of a Code of Conduct,**
- (iii) failure to disclose information required to be disclosed under this Act, or**
- (iv) knowingly directing or counseling a person to commit a wrongdoing described in subparagraphs (i) to (iii).**

The central purpose of this investigation is to determine whether Minister Mitchelmore committed gross mismanagement in violation or suspected violation of the Code of Conduct with respect to the five allegations outlined in **Appendices A and C** of this report. It is important to differentiate the operation of section 54 from Part V of the Act. Section 36, contained in Part V, provides that a member who has reasonable grounds to believe that another member is in contravention of the Code of Conduct may request that the Commissioner for Legislative Standards give an opinion respecting the compliance of the other member with the provisions of the Code of Conduct. So, while a request for an opinion under section 36 requires only an

inquiry into whether the Code has been violated, an investigation, like the one conducted by us, under section 54, requires a determination that a member has committed gross mismanagement in violation of the Code of Conduct.

The term “gross mismanagement” is not defined in the Act. The Public Integrity Commissioner of Canada has identified a number of factors to be assessed when determining whether a situation could constitute gross mismanagement. They are:

- the seriousness of the deviation from standards, policies or practices;
- the functions and responsibilities of the public servant alleged to be responsible for the gross mismanagement;
- seriousness and willfulness of the acts or omissions in question;
- the repetitive or systemic nature of the acts;
- the impact of or potential impact of the mismanagement on the organization's ability to carry out its mandate;
- the impact or potential impact on the organization's employees, clients and the public trust.

We are prepared to consider these factors when assessing the evidence gathered about Minister Mitchelmore's conduct related to each of the five allegations.

It is clear that there is only one standard of proof in a civil case and that is proof on a balance of probabilities.¹

FINDINGS

Allegation #1

Commencing in March 2018 and continuing until October 2018, Minister Mitchelmore directed staff of The Rooms Corporation (“The Rooms”) to hire Ms. Carla Foote as Executive Director of Marketing and Development without competition or a position description, in violation of generally accepted human resources practices, including the application of the merit principle to hiring within the Public Service.

Uncontradicted evidence establishes the following facts:

- There was extensive interest in the recruitment for the vacant Director of Marketing and Development position in 2016-2017. Seventy-seven applicants applied; twenty-one with Master’s degrees and considerable experience in the marketing field. Three were attractive enough to be shortlisted prior to the competition being cancelled.

¹ F. H. v. McDougall [2008] 3 S.C.R. 41.

- The CEO, in June 2018, was able to recruit, for a nine-month contract, a candidate with a degree and significant marketing and development experience. That person's contract was revoked at the direction of Minister Mitchelmore (the context for which is discussed later).
- During 2018, the Board of Directors was engaging in an organizational review in contemplation of the proclamation of a new *Rooms Act*. Its proposed organizational structure was presented and adopted at a Board of Directors meeting held on September 21, 2018. That structure contemplated a Director of Marketing and Development with a salary scale of HL 24. One of the restructuring principles adopted by the Board was that The Rooms would work with the Staffing Division of the Human Resource Secretariat to conduct a merit-based recruitment and selection process when staffing the organizational structure (**APPENDIX G, Page 5**).
- After the Board meeting on September 21, 2018, Dean Brinton received a call from Minister Mitchelmore and his Deputy informing him that Carla Foote would be filling the position of Executive Director of Marketing and Development, and her salary would be comparable to that of her previous position, \$132,000.
- Minister Mitchelmore has consistently maintained in the media, the House of Assembly, and in an interview with us, that Ms. Foote was the best qualified for the position and that her move was a lateral transfer consistent with similar transfers at the executive level within the public service.
- The direction from Minister Mitchelmore to the Board and the CEO necessitated a second Board meeting to amend the organizational structure that had only been approved at the September 21, 2018, meeting and to confirm Ms. Foote's position would be on an executive level. That meeting took place by teleconference on September 27, 2018. There was no evidentiary basis for the Board to elevate the position from "director" to "executive director" between September 21 and September 27, 2018, but for the intervention of the Minister.
- Dean Brinton and the Executive Committee of the Board perceived Minister Mitchelmore's direction to hire Ms. Foote as a direct order. Dean Brinton signed Ms. Foote's contract and both he and the Minister had signed a Request for Staffing Action Form. That Form was not in compliance with explicit Human Resource Secretariat instructions, in that the section dedicated to outlining the rationale for staffing was not completed.
- Ms. Foote commenced employment at The Rooms on October 1, 2018, as Executive Director of Marketing and Development.
- Ms. Foote is the daughter of a former federal Liberal cabinet minister and worked for the provincial Liberal party when it was in opposition.

Minister Mitchelmore has maintained that Ms. Foote was the best qualified candidate for the position and her move was a lateral one, consistent with others within the public service. The

validity of each of those assertions must be assessed against the evidence, legislation, best principles for recruitment, and past practice within the public service.

Was Ms. Foote the best qualified person for the position? During his interview, Minister Mitchelmore did not provide detailed evidence as to how the decision to place Ms. Foote in the Executive Director position was made. No one has provided us with a job description for the Executive Director position or a resume of Ms. Foote's qualifications. We have not been presented with any evidence that other candidates were considered. It is clear that as late as September 21, 2018, the Board of Directors anticipated that The Rooms would conduct a merit-based recruitment and selection process when staffing the organizational structure. No such recruitment occurred for the Executive Director of Marketing and Development. To suggest that Ms. Foote was the best qualified person for this position is to imply that some sort of comparison had been made of the credentials between Ms. Foote and other candidates. If the position had not been reclassified to "executive director", a Public Service Commission competition would have ensued. The Rooms is subject to the *Public Service Commission Act* and the Executive Director of Marketing and Development recruitment was exempt from the aspects of that Act because generally, positions that are paid under the executive pay plan are exempt from Public Service Commission competitions.

Was Ms. Foote's employment at The Rooms a lateral transfer within the executive of government, similar to many others that occur from time to time? The first thing to note is that up until September 21, 2018, the Board of Directors had not contemplated that the Director of Marketing and Development would hold an executive position. The Board did create two executive positions on September 27, 2018, but only after the intervention of Minister Mitchelmore. But for his intervention, we can assume that the Board would have filled the position at a director level.

The *Executive Council Act* gives the premier and cabinet the ability to appoint deputy ministers and assistant deputy ministers within government departments. The Rooms is a Crown Corporation, however, operating under its own legislation. Section 10 of The *Rooms Corporation Act* gives the Chief Executive Officer the responsibility for, among other things, human resources. As outlined in section 8 of that Act, the responsibility over human resources operates under the Board's obligation to implement the policies, systems and programs approved and directed by the Minister and the Human Resource Secretariat. We take this to mean that the Chief Executive Officer can hire, but must adhere to Human Resource Secretariat policies like those around the Request for Staffing Action Form that are attached hereto as **APPENDIX J**. That policy contemplates staffing requests to be initiated after a vacancy is identified and a staffing consultant is contacted. Ordinarily, one would anticipate that the CEO was the person to initiate the staffing request and not the Minister.

Notably, when the Premier or Cabinet hires or transfers deputy ministers and assistant deputy ministers, they do so by issuing publicly available Orders-in-Council. For example, the current Clerk of the Executive Council was the subject of 10 Orders-in-Council documenting her stellar career within the public service. Ms. Foote's placement in the Executive Director position was not authorized by an Order-in-Council.

In conclusion on this allegation, we find that the Board of Directors' stated goal of using the merit principle in hiring for, among others, the Director of Marketing and Development, was undermined by the intervention of Minister Mitchelmore to direct the CEO and the Board to hire Ms. Foote. There is no evidence that suggests that an analysis of Ms. Foote's qualifications was assessed in comparison to other potential candidates; therefore, it is impossible to conclude that she was the best qualified person for the position. The move by Ms. Foote to The Rooms was not similar to other lateral transfers within the senior executive of the public service in that: a) The Rooms operates under its own legislation with authority over human resources vested in the CEO; b) the executive position was created after the intervention of Minister Mitchelmore; and c) an Order-in-Council, under the *Executive Council Act* was not used to authorize her employment at The Rooms.

In determining whether Minister Mitchelmore's actions are a gross mismanagement of his Code of Conduct responsibilities or just a breach of that Code, we have considered a number of factors. We find that there were serious deviations from standard policies and practices which include:

- a) The direction or condoning of the elevation of the marketing and development position to an executive position, literally on the same day that the Board of Directors, after considerable work and consultation with the Human Resource Secretariat, had determined that it should be a director level.
- b) The direction or condoning of the Board of Directors and the CEO to hire Ms. Foote in the absence of a job competition or the provision of a resume, let alone the conduct of a job competition.
- c) The said direction to hire was in contrast to other transfers within the senior executive of government in that it was not supported by an Order-in-Council.

We also note that the Commissioner for Legislative Standards ruled that MHA Joyce breached his Code of Conduct obligations by trying to cause a colleague to interfere, without success, in a Public Service Commission job competition.

We have had the opportunity to consider the very able submissions of Minister Mitchelmore's solicitor on this issue. A key theme of those submissions is that the hiring of Ms. Foote at The Rooms could not happen without the approval of Mr. Brinton, and that if he or the Board disagreed with the hiring, that fact was not made known to Minister Mitchelmore. With respect, we disagree. We find, much like the directive to rescind the contract of A.B., Mr. Brinton was directed to sign the Request for Staffing Action Form and Ms. Foote's contract. The evidence of not just Mr. Brinton, but the members of the Executive Committee of the Board support that conclusion. We also accept the evidence of the Executive Committee that when faced with this direction from the Minister, they felt compelled to comply. This is consistent with their subsequent actions and the fact they voiced their discomfort with the decision to the Deputy Minister when he followed up with them to see if they were on board.

We conclude that Minister Mitchelmore's actions in intervening to facilitate the hire of Ms. Foote at The Rooms not only breached his Code of Conduct, but grossly mismanaged his

obligations under that Code. Specifically, we find that Minister Mitchelmore fundamentally mismanaged his obligations pursuant to the following provisions:

- The fundamental objective of his holding public office is to serve his fellow citizens with integrity in order to improve the economic and social conditions of the people of the Province. (2)
- That he act lawfully and in a manner that will withstand close public scrutiny. (4)
- That he base his conduct on the consideration of the public interest. (7)
- That his relationship with government employees should be professional and based upon mutual respect and should have regard to the duty of those employees to remain politically impartial when carrying out their duties. (10)

Allegation #2

During the relevant time frame, Minister Mitchelmore directed staff of The Rooms to rescind a valid negotiated contract for a person to act as Director of Marketing and Development so as to facilitate the eventual hire of Ms. Carla Foote as Executive Director of Marketing and Development.

The uncontradicted evidence collected in this investigation establishes a finding that Minister Mitchelmore directed Mr. Brinton to rescind the contract of A.B. on June 15, 2018. Mr. Brinton states that he believed he was justified in offering the contract to A.B. because it was of short duration; there was a demonstrable need for the services of A.B.; and he offered similar contracts to other individuals in the past without prior approval of a Minister. While Mr. Brinton may have some justification for those beliefs, the process for staffing all government jobs is delineated in the policy contained in the instructions for completing the Request for Staffing Action Form produced by the Human Resource Secretariat (**APPENDIX J**). That policy clearly anticipates that a Minister would sign a Request for Staffing Action Form prior to an offer of appointment being made. Indeed, the policy dictates a number of other steps, both prior to and after a point, where the Minister signs the form.

Mr. Brinton and others may perceive that Minister Mitchelmore ordered that the contract be rescinded in furtherance of an undisclosed plan to hire Ms. Foote. That may be because applicable policy had not been followed; therefore, he had every right, and indeed responsibility, to order the rescission of the contract.

Allegation #3

Minister Mitchelmore instructed staff to set the salary for the Executive Director of Marketing and Development position to which Ms. Foote was appointed at \$132,000, far exceeding the salary provided for in the vacant Director of Marketing and Development position at The Rooms, thereby grossly mismanaging public funds.

The uncontradicted evidence collected during this investigation supports the following findings:

- The position of Director of Marketing and Development which existed at The Rooms prior to 2018 commanded a salary of approximately \$80,000.
- The contract of employment negotiated by Mr. Brinton with A.B. to act in the Director of Marketing and Development position for an eight-month term provided for an annual salary of \$85,513.
- The position of Director of Marketing and Development approved within the organizational structure of The Rooms by the Board of Directors on September 21, 2018, contemplated a salary within the HL 24 level (**APPENDIX G, Page 10**). That pay range starts at \$76,666 and culminates with a salary of \$107,612. The Board of Directors anticipated that the final classification would be in accordance with applicable Human Resource Secretariat policies.
- A search of the Order-in-Council database at the Cabinet Secretariat reveals that on September 28, 2018, the Executive Council appointed a replacement for Ms. Foote in her former position of Associate Secretary to Cabinet (Communications) effective October 1, 2018. The replacement was paid on the Executive Compensation Plan.

Minister Mitchelmore maintained in his interview with us, and through the written submissions of his solicitor, that he didn't dictate the rate of pay for Ms. Foote. Rather, she moved laterally from an executive level position of Associate Secretary to Cabinet reporting to the Premier, to an executive level position at The Rooms and, because it was a lateral move, her salary did not change.

Section 8 of Minister Mitchelmore's Code of Conduct requires that he, in performing his official duties, apply public resources prudently. The underlying rationale for this Code requirement was exemplified by former cabinet minister Cathy Bennett, when she stated:²

"The days of having a culture of spending and not being reverent to the public purse are over, and we are expecting all those entities to sharpen their pencils and to go through their operations in a way that is responsible and in a way the people of the Province expect."²

Minister Mitchelmore's rationale for how Ms. Foote received a salary of \$132,000 at The Rooms does not take into account what transpired. As noted in our Findings on Allegation #1, Ms. Foote's transfer to The Rooms was different from lateral transfers between line departments. There is ample evidence to suggest that The Rooms could have recruited highly competent candidates for the position of Director of Marketing and Development with compensation allocated in the HL 24 salary range. The Board of Directors, after studying how best to organize its institution, had decided that an HL 24 salary scale was appropriate for the position. The reclassification by the Board of the position on September 27, 2018, was to accommodate the hire of Ms. Foote. The net effect is that The Rooms are overcompensating for the position of Executive Director of Marketing and Development in the range of \$30-\$40,000

² "Province Cuts Memorial Grant; says tuition Freeze up to Memorial University": The Northern Pen April 14, 2016

per year. We also note that government didn't realize any salary savings by keeping Ms. Foote's former position vacant, as a replacement was appointed for her upon the commencement of her work with The Rooms.

It may be that Minister Mitchelmore did not directly order the executive pay level for Ms. Foote, though we do note he signed the Request for Staffing Action Form which authorized it. One of the factors listed earlier in this report for assessing gross mismanagement was a review of the functions and responsibilities of the public servant alleged to be responsible for the gross mismanagement. Reasonable people would expect the Minister of the Crown to exact strict scrutiny to a request for additional salary expenditures. Indeed, that is nearly universally the case. Here, Minister Mitchelmore either directly authorized the salary level for Ms. Foote through his signature on the Request for Staffing Action Form, and/or he acquiesced in her receiving that level of pay. Having done so, we find that Minister Mitchelmore grossly violated his obligations as contained in section 8 of the Code of Conduct.

Allegation #4

Minister Mitchelmore directed staff of The Rooms to delete e-mails in contradiction of best practices for document storage and contrary to law.

During the course of our investigation we interviewed both Mr. Brinton's and Mr. Lomond's Executive Assistants, separately. They were able to provide evidence concerning this allegation which is the subject of another inquiry by this office. Both individuals confirmed that Minister Mitchelmore was not involved in directing the deletions that are referenced in this allegation.

There is insufficient evidence to make a finding of wrongdoing with respect to this allegation.

Allegation #5

Generally, Minister Mitchelmore's involvement in the hiring of Ms. Carla Foote at The Rooms undermines the reputation of The Rooms and its ability to carry out its objects and purposes.

It was clear during our investigation that the Executive Committee of the Board and Mr. Brinton held well-founded fears of harm being done to both the functioning and reputation of The Rooms as a result of the way in which Ms. Foote was appointed. We thoroughly reviewed all media articles dealing with this issue and the numerous letters and e-mails which were sent to government and The Rooms by people upset and disgusted with this matter. Some volunteers did resign and donors have threatened to cease their donations. We are advised that some staff considered the hire of Ms. Foote as unfair.

We note that on December 12, 2018, the Chair and Vice Chair of the Board, in a meeting with the Minister, expressed their concerns about the damage done by the way in which Ms. Foote was appointed. They thought that this was unprecedented and had the potential to damage the independence of the Board and its capacity to fulfill its mandate.

One of the factors we consider in assessing whether actions can be classified as gross mismanagement is the impact or potential impact of the mismanagement on the organization's ability to carry out its mandate. While the fallout from the appointment of Ms. Foote was significant, we cannot conclude that the organization's ability to carry out its mandate will continually and significantly impact its ability to carry out its objects and responsibilities.

We concluded the evidence does not support a finding of wrongdoing with respect to this allegation.

A CONCLUSION ON THE FINDINGS

We conclude that Minister Mitchelmore grossly mismanaged his obligations with respect to the Code of Conduct given his involvement in the appointment of Ms. Foote to The Rooms and the setting, or permitting to be set, her salary at \$132,000.

We would like to make clear that there was no evidence to suggest that Minister Mitchelmore, in any way, received monetary or other benefit with respect to the matters discussed in this report. Indeed, as evidenced by the media attention which the issue attracted, his reputation may have been harmed.

CORRECTIVE ACTION

Subsections 58(7) and 58(10) of the Act state:

Investigation

58.

(7) Upon completing an investigation, an investigator shall report, in writing, to the clerk and the speaker on his or her findings and recommendations about the disclosure and the wrongdoing.

(10) The speaker, or the chairperson of the audit committee shall, if the report recommends corrective action,

(a) refer the report to the auditor general, the Attorney General, the Minister of Finance or other appropriate official to take appropriate action; or

(b) refer the report to the commission.

Having identified wrongdoing as defined by the Act in breach of a code of conduct, we recommend that corrective action be taken to address these findings.

It is our considered opinion that the correct procedure to follow in this matter is for the Speaker to contemplate if there are reasonable grounds to believe a member is in contravention of the code of conduct adopted under subsection 35(1) of the Act, and if so, refer

this matter to the Commissioner of Legislative Standards for consideration as the “appropriate official to take appropriate action” as anticipated by subsection 10(a) of the Act.

The OCR is an investigative body. We have vast experience in interviewing witnesses, document collection and analysis, and research and report writing. That may be why legislatures across Canada have designated Ombudsman offices as lead investigators for public interest disclosures.

We have investigated the public interest disclosure that precipitated this report and have outlined our findings. We have no particular experience in formulating an appropriate corrective action for a legislator who has been found to have committed wrongdoing. In the fullness of time, and as other statutory officers in Canada are called upon to undertake such tasks within legislatures, there may be developed a body of precedent which could give guidance to cases like this. But for now, we believe it is more appropriate for the Commissioner, who has competent jurisdiction and experience in deliberating on code of conduct matters, to make such a determination and advise the House of Assembly.

Dated at St. John's, Newfoundland and Labrador, this 11th day of June, 2019.



Bradley J. Moss
Citizens' Representative

APPENDIX A

Letter from Barry Fleming, QC, to the
Honourable Christopher Mitchelmore
dated January 4, 2019.



Private & Confidential

January 4, 2019

Honourable Christopher Mitchelmore
Minister
Department of Tourism, Culture,
Industry and Innovation
Confederation Building
St. John's, NL A1B 4J6

Dear Sir,

Re: Our File #3WB19

I write to advise that I have received a public interest disclosure alleging that you have committed a wrongdoing pursuant to *Part VI of the House of Assembly Accountability, Integrity and Administration Act* (the "Act"). The disclosure pertains to your involvement in directing the staff of the Rooms Corporation (the "Rooms") to hire Ms. Carla Foote as Executive Director of Marketing and Development.

The public interest disclosure alleges that you grossly mismanaged your obligations in violation or suspected violation of your Code of Conduct for Members of the House of Assembly. More specifically:

- a) Commencing in March 2018 and continuing until October 2018, you directed staff of the Rooms to hire Ms. Carla Foote as Executive Director of the Rooms without a competition or a position description in violation of generally accepted human resources practices, including the application of the merit principle to hiring within the public service.
- b) During the relevant timeframe, you directed staff of the Rooms to rescind a valid negotiated contract for a person to act as Director of Marketing and Development so as to facilitate the eventual hire of Ms. Carla Foote as Executive Director of Marketing and Development.
- c) You instructed staff to set the salary of the Executive Director of Marketing to which Ms. Foote was appointed, at \$132,000, far exceeding the salary generally provided for in the vacant Director of Marketing and Development position at the Rooms, thereby grossly mismanaging public funds.
- d) You directed staff of the Rooms to delete emails in contradiction of best practices for document storage and contrary to law.
- e) Generally, your involvement in the hiring of Ms. Carla Foote undermined the reputation of the Rooms and its abilities to carry out its objects and purposes.

The sections of the Code of Conduct which you are alleged to have breached include, but are not limited to, the following:

- 1) Members...shall ensure that their conduct does not bring the integrity of their office or the House of Assembly into disrepute.
- 3) Members...refuse to participate in unethical political practices which tend to undermine the democratic traditions of our Province and its institutions.
- 6) Members will carry out their official duties...in a manner that protects the public interest and enhances public confidence and trust in government and in high standards of ethical conduct in public office.
- 7) Members will base their conduct on a consideration of the public interest.
- 8) In performing their official duties, Members will apply public resources prudently...
- 10) Relationships between Members and government employees shall be professional and based upon mutual respect and should have regard to the duty of those employees to remain politically impartial when carrying out their duties.
- 11) Members shall promote and support these principles by leadership and example.

Pursuant to the provisions of the Act, I request that you provide me, by January 18, 2019, with copies of all emails, blackberry messages, hand-written notes, calendar requests, and any other documentation related to the allegations outlined herein. I would point out that the matters detailed above are allegations only and I am required to undertake an informal and expeditious investigation. I also provide all parties with procedural fairness which means I will unbiasedly assess all evidence you provide and objectively consider any submissions you forward to me. I hope to arrange a meeting with you near the conclusion of our investigation.

There are two provisions of the Act which you should be aware of as this investigation proceeds. Section 60 makes it an offense to make a false or misleading statement to me in the course of an investigation, or to destroy, substitute or withhold a document. An offense under this section is liable on a summary conviction of a fine of not more than \$10,000.

Section 59 states that no person should take a reprisal against any person who files disclosure with my office, or cooperates in any way with that investigation. I have an obligation under the Act to keep confidential, to the extent possible, the identity of the discloser. We will utilize all the power in our governing legislation to prevent and/or rectify a reprisal should one occur.

I anticipate your professionalism and cooperation throughout this process. If you have any questions, please do not hesitate to contact me.

Yours truly,



Barry Fleming, Q.C.
Citizens' Representative

APPENDIX B

Letter from Barry Fleming, QC, to Carla Foote
dated January 11, 2019.



**Office of the Citizens' Representative
Province of Newfoundland and Labrador**

FILE COPY

4th Floor, Beothuck Building, 20 Crosbie Place, P.O. Box 8400, St. John's, NL A1B 3N7
Telephone: (709) 729-7647 Toll Free: 1 (800) 559-0079 Facsimile: (709) 729-7696
Email: citrep@gov.nl.ca Website: www.citizensrep.nl.ca

Private & Confidential

January 11, 2019

Carla Foote
Executive Director of Marketing & Development
The Rooms
9 Bonaventure Avenue
P.O. Box 1800, Station C
St. John's, NL A1C 5P9

Dear Ms. Foote,

Re: OCR File #'s 2WB19 and 3WB19

I am currently investigating two public interest disclosure complaints concerning your recruitment to the position of Executive Director of Marketing and Development at the Rooms Corporation. One disclosure has been made under the *Public Interest Disclosure and Whistleblower Protection Act* and the other under the *House of Assembly Accountability, Integrity and Administration Act* (collectively referred to as the "legislation").

You are not a subject of these investigations; however, I thought it was fair to inform you of their existence. At this time I do not require any information from you. Should that change, I will advise you accordingly.

If you wish to meet with me to discuss any issue arising from these investigations or if you have any questions, please do not hesitate to contact me.

Yours truly,

Barry G. Fleming, Q.C.
Citizens' Representative

APPENDIX C

Letter from Barry Fleming, QC, to the
Solicitor for Minister Mitchelmore (with
Enclosures) dated February 18, 2019.



Office of the Citizens' Representative
Province of Newfoundland and Labrador

FILE COPY

4th Floor, Beothuck Building, 20 Crosbie Place, P.O. Box 8400, St. John's, NL A1B 3N7
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Email: citrep@gov.nl.ca Website: www.citizensrep.nl.ca

Confidential

February 18, 2019

Wadden Peddigrew Hogan Law
94 Elizabeth Avenue
2nd Floor, Suite 4
St. John's NL
A1B 1R8

Attention: Chris Peddigrew

Re: Our File #3WB19

Please find enclosed further particulars of the allegations against Minister Mitchelmoore which were initially contained in my January 4th letter to him. You'll note that the commentary for each allegation is broken into two sections. The first outlines what we believe the evidence suggests concerning the allegations to date. The second discusses the considerations which we will have to assess if the evidence is found to be true.

I would be obliged if you could provide any submissions you might wish to make concerning the information enclosed by Wednesday, March 6, 2019.

If you have any questions, please do not hesitate to contact me.

Yours truly,

Barry Fleming, QC
Citizens' Representative

Encl.

Allegation #1

Commencing in March 2018 and continuing until October 2018, you directed staff of the Rooms Corporation (“the Rooms”) to hire Ms. Carla Foote as Executive Director of Marketing and Development without competition or a position description, in violation of generally accepted human resources practices, including the application of the merit principle to hiring within the public service.

What the Evidence Suggests

The evidence suggests that prior to 2018, due to budgetary constraints, the position of Director of Marketing and Development with the Rooms Corporation was vacant. Dean Brinton, the CEO of the Rooms (the “CEO”) alleges that, after receiving a call from you on March 1, 2018, saying you had someone in mind to fill the vacant Director position, Ted Lomond, Deputy Minister of Tourism, Culture, Industry and Environment, called later in the month and asked whether office space and a computer were ready for the new employee. The CEO indicated that he had not received a resume or any other information concerning the candidate. The Deputy indicated that he did not know who the candidate was and that government would, in the near future transfer a current government employee to the Rooms.

On April 30, 2018, the CEO sent the Deputy an e-mail asking when he could move forward with filling the vacant position. The Deputy did not respond to this e-mail. On May 3, 2018, the CEO sent another e-mail to the Deputy inquiring as to who the candidate was that you had asked him to consider for the Director of Marketing position. The Deputy did not respond to this e-mail.

Evidence and Considerations Centering around the Rescinding of a Contract Offer to [REDACTED] is Discussed in (2) below.

During July and August 2018 the CEO and the Board of the Rooms worked with the Human Resource Secretariat to develop a revised organizational structure. This was required so as to permit the Rooms to adopt and make operational the provisions of the new *Rooms Act*. On September 21, 2018, the Board of Directors approved a new organizational structure which included a Director of Marketing and Development position. That position was not an executive level management position. The sub-committee of the Board responsible for the new organizational structure indicated that any new positions will be created and classified in accordance with applicable collective agreements and Human Resource Secretariat policies, and that further, the Rooms would work with the Staffing Division of the Human Resource Secretariat to conduct a merit-based recruitment and selection process when staffing the organizational structure. (See the slide presentation attached.)

After the Board meeting on September 21, 2018, the CEO alleges that he was seated with the Executive Committee of the Board in his office when he received a call from you and the Deputy. The Deputy asked the CEO to have the Executive Committee members leave the room. The CEO alleges that the Deputy indicated that Ms. Carla Foote would start the following week in the position of Executive Director of Marketing and Development at the Rooms. On September 26, 2016, you and the CEO signed a request for staffing action for the Executive Director position. The place on the form for providing a rationale for staffing was left blank. Ms. Foote commenced work with the Rooms in that position on October 1, 2018.

Considerations

Did your actions in participating, facilitating and directing the hire of Ms. Carla Foote at the Rooms breach or offend the following:

1. Section 10 (2) (a) of the *Rooms Act* which provides that the CEO is responsible for the human resources, general direction, supervision and control of the finances and other business of the Corporation and of the divisions of the Corporation.
2. The merit principle as contained in section 13 of the *Public Service Commission Act* which states that recommendations for appointments to and promotions within the public service shall be based on merit principles and made by the Commission through competitive written examination or by other processes of personnel selection designed to establish the merit of candidates that the Commission considers are in the best interest of the public service. The Rooms is a scheduled body to that legislation.
3. The reasonable expectations of the Board of Directors when they anticipated that the new position would be created and classified in accordance with applicable Human Resource Secretariat policies and further, that the Staffing Division of that Secretariat would conduct a merit-based recruitment and selection process when hiring the Executive Director.
4. Generally accepted human resource practices which dictate that recruitment for positions be undertaken after the needs for that position are assessed; the creation of a job description; the creation of a job ad; publication of the job ad; receipt and

screening of applications from interested persons; the conduct of interviews; and the determination of a short list of suitable candidates is made.

5. The Code of Conduct for Members of the House of Assembly, including, but not limited to, sections 2, 3, 4, 7, 10 and 11.

Allegation #2

During the relevant time frame, you directed staff of the Rooms to rescind a valid negotiated contract for a person to act as Director of Marketing and Development so as to facilitate the eventual hire of Ms. Carla Foote as Executive Director of Marketing and Development.

What the Evidence Suggests

In anticipation of the busy tourism season, and having interviewed a qualified candidate, the CEO, on June 4, 2018 signed a contract with [REDACTED] to become the Director of Marketing and Commercial Enterprises during the period from July 16, 2018 to March 31, 2019. It was made clear to [REDACTED] that the position would eventually be filled through a Public Service Commission sanctioned competition. The contract provided for a per annum salary of \$85,513 which corresponded with HL 24 step 10 of the relevant pay scale.

The CEO alleges that on Friday, June 15, 2018 he received a telephone call from the Deputy indicating that the Rooms would be getting a new Director of Marketing immediately. When he told the Deputy that he had already signed a contract with someone on June 4 and that they would be starting work on July 16, the Deputy indicated that he would get back to the CEO immediately. A short time later the Deputy phoned and asked that he send a copy of [REDACTED] contract to you. At approximately 1:00 pm on that day the CEO received an e-mail and a copy of a letter from the Deputy. The text of the letter, which was addressed to [REDACTED] was printed on mocked up letterhead for "Government of Newfoundland and Labrador - the Rooms Corporation - Office of the Chief Executive Officer". The text of the letter advises

██████████ that her offer of contractual employment with the Rooms was hereby revoked, effective immediately. Later that day, in a telephone conversation with the Deputy, the CEO stated that he disagreed with the termination of ██████████ contract and that the department should not interfere in a legal contract issued by the Rooms. At approximately 2:00 pm on that day the CEO alleges that he received a telephone call from you. The CEO states that he was directed to immediately sign the letter rescinding ██████████ contract. This was a direct order from you. He reluctantly signed and sent the letter rescinding ██████████ contract.

██████████ has subsequently made a claim for damages against the Rooms and/or Government.

Considerations

Did your actions in directing staff of the Rooms to rescind a valid negotiated contract to ██████████ breach or offend the following:

1. Section 10 (2)(a) of the *Rooms Act* which provides that the CEO is responsible for the human resources, general direction, supervision and control of the finances and other business of the Corporation and of the divisions of the Corporation.
2. The Code of Conduct for Members of the House of Assembly including, but not limited to, sections 2, 3, 4, 7, 10 and 11.
3. Section 54 (1) (e) (ii) of the *House of Assembly Accountability, Integrity and Administration Act* having regard that your actions in

cancelling [REDACTED] contract resulted in legal liability for the Rooms and Government.

Allegation #3

You instructed staff to set the salary for the Executive Director of Marketing and Development position to which Ms. Foote was appointed at \$132,000, far exceeding the salary provided for in the vacant Director of Marketing and Development position at the rooms, thereby grossly mismanaging public funds.

What the Evidence Suggests

The position of Director of Marketing and Development which existed prior to 2018 commanded a salary of approximately \$80,000.

The contract of employment negotiated with [REDACTED] and signed on June 4, 2018 provided for an annual salary of \$85,513.

The position of Director of Marketing and Development approved within the organizational structure of the Rooms by the Board of Directors on September 21, 2018, contemplated a salary within the HL-24. That pay range starts at \$76,666 and culminates with a salary of \$107,612. In any event, the Board of Directors anticipated the position would be classified in accordance with applicable Human Resource Secretariat policies.

The CEO alleges that in the week following the September 21st board meeting, he received a number of telephone calls from the Deputy instructing him to sign all relevant documents to hire Ms. Foote. He states that he advised the Deputy that because the salary for Ms. Foote

was \$132,000, he could not do so without board approval. He also indicates that he informed the Deputy that this salary far exceeded the salary range for previous Directors of Marketing and Development and that it would require a change to the organizational structure of the Rooms which had just recently been approved by the Board. The CEO and the Board felt that they were under a direct order from you that was conveyed by the Deputy, to approve the contract and did so at a Board meeting teleconference on September 26, 2018.

Considerations

Did your actions in setting the salary for Ms. Carla Foote at \$132,000 breach or offend any of the following:

1. Section 10 (2) (a) of the *Rooms Act* which provides that the CEO is responsible for the human resources, general direction, supervision and control of the finances and other business of the Corporation and of the divisions of the Corporation.
2. The Code of Conduct for Members of the House of Assembly, including, but not limited to, sections 2, 3, 4, 7, 10 and 11.
3. Section 54 (1) (e) (ii) of the *House of Assembly Accountability, Integrity and Administration Act* in that you set the salary for Ms. Foote's position at a range far higher than necessary so as to constitute gross mismanagement of public funds.

Allegation #4

You directed staff of the Rooms to delete e-mails in contradiction of best practices for document storage and contrary to law.

It is alleged that on Friday, June 15, 2018, the Deputy directed staff of the Rooms to delete an e-mail. We have interviewed both his former Executive Assistant, Carla Joy, and the CEO's Executive Assistant, Wanda Lambert. Ms. Lambert has a vivid recollection of the events of that day. Ms. Joy does not have any specific recollection of the events of that day. She did say that, from time to time, she would advise others within the department, or agencies reporting to the department, to delete transitory records as per OCIO policies.

The CEO alleges that at 1:03 PM on June 15, 2018, he received an e-mail and a copy of a letter from the Deputy. These dealt with the direction from you to the CEO to rescind the contract the CEO offered to [REDACTED]. Ms. Lambert alleges that on that day she received a telephone call from Ms. Joy telling her to delete both the Deputy's e-mail and the letter to [REDACTED] that had been previously sent by him. Ms. Lambert is clear that this was not a general recommendation to delete transitory records, but was rather a specific instruction from the Minister's office. Ms. Lambert did not delete the e-mail.

Ms. Lambert alleges that at approximately 5 pm on June 15th Ms. Joy again telephoned her and asked whether the letter had been sent to [REDACTED] and whether the Deputy's e-mail of 1:03 pm had been deleted. Ms. Lambert heard the Deputy in the background instructing

his assistant, Ms. Joy, to demand that she delete all records related to the government's decision to rescind a contract of [REDACTED]

Considerations

Did the direction from your Ministerial office to staff of the Rooms to delete e-mails violate or offend the following:

1. Section 4 of the *Management of Information Act* which states that records of the Crown must not be destroyed or removed from the ownership or control of the Crown unless the destruction or removal is authorized by that legislation.
2. The Code of Conduct for Members of the House of Assembly, including, but not limited to, sections 2, 3, 4, 7, 10 and 11.

Allegation #5

Generally, your involvement in the hiring of Ms. Carla Foote at the Rooms undermines the reputation of the Rooms and its ability to carry out its objects and purposes.

What the Evidence Suggests

The media storm which followed the hiring of Ms. Carla Foote by the Rooms is a matter of public record. It is alleged that you knew, or should have known, the negative public reaction to the hiring.

We have interviewed all the members of the Executive Committee of the Board of Directors of the Rooms. They felt that after the Board meeting on September 21st, they and the CEO, were clearly directed to hire Ms. Foote. During October 2018, they were deeply troubled by the media and public reaction to what was perceived as political interference in the operation of the Rooms. They retained senior legal counsel to advise them of what options were available to respond. They were advised that on the basis of the public record nothing illegal had occurred, but the developments have caused serious damage to the operation of the Rooms and its relationship with the Department. It was an open question as to the ethics of the Department's actions.

A meeting was held on or around December 12, 2018, with the Executive Committee, you, the Deputy, Bradley George, who is your Executive Assistant, and Mark Browne, Parliamentary Assistant to you. From the Board's perspective, it was hoped the meeting would achieve a number of goals. First, the Board wanted to outline the harm done to

the Rooms as a result of the hiring of Ms. Carla Foote and the media reaction to same with the hope the hiring of Ms. Foote would be reconsidered. Second, it wanted to make clear that the Board had no intention of publicly defending the hiring of Ms. Foote in the face of public criticism. Finally, the Board hoped that the meeting would help clarify the roles of it and the department moving forward.

The Board is of the view that the damage done to the Rooms by this hiring occurred on primarily three levels. First it damaged the credibility of the Rooms with donors and funding agencies. There is evidence that at least one philanthropist has indicated she will reconsider future funding requests by the Rooms. Second, it damaged the credibility of the Rooms with the general public, arts community, and volunteers, resulting in a lessening of public engagement and negatively impacting on the Rooms' ability to carry out its objectives. Finally, the incident damaged the autonomy of the Board and its ability to carry out its mandate as set forth in its legislation. The intervention of you and the Deputy was seen as precedent-setting in respect of the appointment of other senior management staff and it detracts from the power of the Board to manage the Corporation and to oversee its operations.

Considerations

Did your involvement in the hiring of Ms. Carla Foote cause material harm to the reputation and operations of the Rooms in violation of sections 2, 3, 4, 7, 10 and 11 of the Code of Conduct for Members of the House of Assembly?

APPENDIX D

**Letter from the Solicitor for Minister Mitchelmore
to Barry Fleming, QC, dated April 17, 2019**



April 17, 2019

Office of the Citizen's Representative
Province of Newfoundland and Labrador
20 Crosbie Place
PO Box 8400
4th Floor, Beothuk Bldg.
St. John's, NL A1B 3N7

Attention: Barry Fleming, Q.C

Dear Mr. Fleming:

**Re: Our Client – The Honourable Christopher Mitchelmore, Minister of the Department of
Tourism, Culture, Industry and Innovation
Your file number – 3WB19**

Please be advised we represent Minister Christopher Mitchelmore in relation to a public interest disclosure received by your office alleging Minister Mitchelmore committed a wrongdoing pursuant to *Part VI of the House of Assembly Accountability, Integrity and Administration Act* (the "Act") in relation to the hiring of Ms. Caria Foote as Executive Director of Marketing and Development at The Rooms.

In your January 4, 2019 letter you state the public interest disclosure alleges Minister Mitchelmore "grossly mismanaged" his obligations in violation or suspected violation of the Code of Conduct for Members of the House of Assembly. More specifically, it is alleged that:

- a) commencing in March 2018 and continuing until October 2018, Minister Mitchelmore directed staff of the Rooms to hire Ms. Carla Foote as Executive Director of the Rooms without a competition or a position description in violation of generally accepted human resources practices, including the application of the merit principle to hiring within the public service;
- b) during the relevant timeframe, Minister Mitchelmore directed staff at the Rooms to rescind a valid negotiated contract for a person to act as Director of Marketing and Development so as to facilitate the eventual hire of Ms. Carla Foote as Executive Director of Marketing and Development;

94 Elizabeth Avenue
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(709) 700-2159

WPH_Law
/wphlaw

- c) Minister Mitchelmore instructed staff to set the salary of the Executive Director of Marketing to which Ms. Foote was appointed, at \$132,000, far exceeding the salary generally provided for in the vacant Director of Marketing and Development position at the Rooms, thereby grossly mismanaging public funds;
- d) Minister Mitchelmore directed staff of the Rooms to delete emails in contradiction of best practices for document storage and contrary to law; and
- e) Generally, Minister Mitchelmore's involvement in the hiring of Ms. Carla Foote undermined the reputation of the Rooms and its abilities to carry out its objects and purposes.

In terms of these allegations, Minister Mitchelmore is accused of breaching the Code of Conduct for Members of the House of Assembly (the "Code of Conduct"), including but not limited to sections 1), 3), 6), 7), 8), 10) and 11). These sections are set out below:

1. Members shall inform themselves of and shall conduct themselves in accordance with the provisions and spirit of the Standing Orders of the House of Assembly, the *House of Assembly Accountability, Integrity and Administration Act*, the *Members' Resources and Allowances Rules*, the *Elections Act, 1991*, the *House of Assembly Act* and this Code of Conduct and shall ensure that their conduct does not bring the integrity of their office or the House of Assembly into disrepute.
2. ...
3. Members reject political corruption and refuse to participate in unethical political practices which tend to undermine the democratic traditions of our province and its institutions.
4. ...
5. ...
6. Members will carry out their official duties and arrange their private financial affairs in a manner that protects the public interest and enhances public confidence and trust in government and in high standards of ethical conduct in public office.
7. Members will base their conduct on a consideration of the public interest. They are individually responsible for preventing conflicts of interest and will endeavour to prevent them from arising. Members will take all reasonable steps to resolve any such conflict quickly and in a manner which is in the best interests of the public.

8. In performing their official duties, Members will apply public resources prudently and only for the purposes for which they are intended.
9. ...
10. Relationships between Members and government employees should be professional and based upon mutual respect and should have regard to the duty of those employees to remain politically impartial when carrying out their duties.
11. Members should promote and support these principles by leadership and example.
12. ...

With your letters of February 18 and February 26, 2019, you provided additional information relating to the allegations against Minister Mitchelmore. In your letter of March 7, 2019 you provided certain information that had been requested by us.

Section 54(1)(e) of the Act, defines "wrongdoing" as follows:

54(1)(e) "wrongdoing", with respect to a member...of the House of Assembly...means

- (i) an act or omission constituting an offence under this Act,
- (ii) *gross mismanagement, including of public money under the stewardship of the commission, in violation of suspected violation of the code of conduct,*
- (iii) failure to disclose information required to be disclosed under this Act, or
- (iv) knowingly directing or counseling a person to commit a wrongdoing described in subparagraphs (i) to (iii).

In our February 1, 2019 letter, we requested confirmation of the specific subsection of the Act Minister Mitchelmore is alleged to have violated. Based on your February 18, 2019 correspondence, it appears the only subsection Minister Mitchelmore is alleged to have violated is subsection 54(1)(e)(ii). Subsection 54(1)(e)(ii) of the Act refers to "gross mismanagement" in violation or suspected violation of the Code of Conduct. While the term "gross mismanagement" is not defined in the Act, you provided us with information from the Office of the Public Sector Integrity Commissioner of Canada which states the following in response to the question "What is 'gross mismanagement' in the public sector?":

Gross Mismanagement generally applies to very serious situations that result or could result in a breach of public interest. The following factors, among others, are considered when determining whether a situation could constitute "gross mismanagement":

- *the seriousness of the deviation from standards, policies or practices;*
- *the functions and responsibilities of the public servant alleged to be responsible for gross mismanagement;*
- *the seriousness and willfulness of the acts or omissions in question;*
- *the repetitive or systemic nature of the acts;*
- *the impact or potential impact of the mismanagement on the organization's ability to carry out its mandate;*
- *the impact of potential impact on the organization's employees, clients and the public trust.*

We also found the following list of factors on the Office of the Public Sector Integrity Commissioner of Canada website setting out what is considered when investigating an allegation of gross mismanagement under the federal *Public Servants Disclosure Act*:

- *Matters of significant importance;*
- *Serious errors that are not debatable among reasonable people;*
- *More than de minimis wrongdoing or negligence;*
- *Management action or inaction that creates a substantial risk of significant adverse impact upon the ability of an organization, office or unit to carry out its mandate;*
- *Management action or inaction that poses serious threat to public confidence in the integrity of the public service, and that does not only concern a personal matter, such as individual harassment complaints or individual workplace grievances;*
- *The deliberate nature of the wrongdoing; and*
- *The systemic nature of the wrongdoing.*

An allegation of "gross mismanagement" is a serious accusation and has a high likelihood, along with the allegation of a breach of the Code of Conduct, of seriously damaging the reputation and character of Minister Mitchelmore. Minister Mitchelmore works extremely hard for the people of his district and the people of this Province and allegations like these have the potential to undo years of exemplary work and effort. A finding of "gross mismanagement" should not be made based on differences of opinion and in the absence of clear and convincing evidence that Minister Mitchelmore actually engaged in conduct constituting "gross mismanagement in violation or suspected violation of the code of conduct".

To briefly summarize Minister Mitchelmore's position, he denies he committed a "wrongdoing" within the meaning of the Act, whether through "gross mismanagement" in violation or suspected violation of the Code of Conduct, or otherwise. Minister Mitchelmore states the hiring of Carla Foote for the position of Executive Director of Marketing and Development at the Rooms was carried out appropriately and in accordance with the Act, the Code of Conduct and generally

accepted human resources practices applicable to Government and the Rooms. While others may feel Ms. Foote was not the best choice or the right choice or that there might have been better candidates, such disagreements can and often do arise when any position is filled within or outside the public service. In reference to the words from the website of the Office of the Public Sector Integrity Commissioner of Canada, the choice for filling a job vacancy is the type of decision that is often debatable among reasonable people. But such matters should not be the basis for a finding of gross mismanagement. There is no evidence that Minister Mitchelmore's involvement in Ms. Foote's appointment constitutes "gross mismanagement" or was otherwise a "wrongdoing" or breach of the Code of Conduct. We will now address each allegation individually.

Allegation a) - commencing in March 2018 and continuing until October 2018, Minister Mitchelmore directed staff of the Rooms to hire Ms. Carla Foote as Executive Director of the Rooms without a competition or a position description in violation of generally accepted human resources practices, including the application of the merit principle to hiring within the public service;

Minister Mitchelmore denies these allegations. In response, he states as follows:

- Throughout the latter part of 2017 and into 2018, Minister Mitchelmore had concerns about the relationship between the Rooms and core Government, including with his own department. The opinion of others within core Government, including Minister Mitchelmore, was that there was a communications gap between core Government and the Rooms such that Government was not being appropriately informed about and included in various Rooms' announcements and initiatives. Government is the Rooms' primary funder and the Rooms is an agent of Government pursuant to the *Rooms Act*. The Rooms is arguably the Province's most important cultural establishment with its mandate, activities and reach spanning several Government departments. The Rooms is the successor custodian of vitally important Provincial artifacts and historical records. In short, it is very important for there to be good lines of communication and coordination between Government and the Rooms for many Rooms initiatives and activities. In the 2017-2018 time period, there were numerous individuals in Government, including Minister Mitchelmore, who were of the view that it was important to strengthen and improve the relationship between the Rooms and Government, including from a communications standpoint;
- Minister Mitchelmore does not know why the Director of Marketing position was not filled in November 2016, when three supposedly suitable external candidates were short listed for the Director of Marketing role through a job competition process;

- As of March 2018, Government had gone through its flatter and leaner management restructuring. As a result, there was ongoing movement and turnover within higher level positions in the public service, including at the executive level. It was recognized there were likely internal candidates from within Government who would be suitable for the lead marketing role at the Rooms. Core Government, including Minister Mitchelmore, was of the view that an internal candidate would also help address the perceived gaps in communications and coordination between the Rooms and core Government;
- In about March 2018, after the Rooms had been experiencing some negative publicity, Minister Mitchelmore raised with Rooms Chief Executive Officer, Dean Brinton, the importance of filling the vacant Director of Marketing role. When Minister Mitchelmore discussed this with Mr. Brinton, he informed Mr. Brinton that there were likely suitable internal candidates within Government for the lead marketing role at the Rooms;
- No specific internal core Government candidates were being considered by Minister Mitchelmore as of March 2018, including Carla Foote. Ms. Foote's name was not raised by Minister Mitchelmore with Mr. Brinton until September 2018;
- In your February 18, 2019 letter, under Allegation #1, you state the evidence suggests that on April 30, 2018 and May 3, 2018, Mr. Brinton emailed Ted Lomond asking about moving ahead with filling the vacant marketing role and asking who the candidate was for the marketing role, but that Mr. Lomond did not reply to either email. Minister Mitchelmore does not know whether Mr. Lomond replied to Mr. Brinton or what other communications may or may not have occurred between them;
- Throughout 2018, an organizational review of the Rooms was taking place in relation to the anticipated (still to be proclaimed) *Rooms Act, 2016*;
- As of the fall of 2018, the position of Director of Provincial Art Gallery Division had been vacant since 2017, when the previous Director resigned;
- As of the fall of 2018, the position of Director of Marketing at the Rooms had been vacant for approximately two years. While we understand there is an allegation that Minister Mitchelmore interfered with a valid contract offer made to an external candidate (██████████) by Mr. Brinton in the spring of 2018 to fill this position, we will explain in the response to allegation b) why Mr. Brinton's actions in making this offer were not appropriate and why the offer he extended was invalid;
- Minister Mitchelmore acknowledges section 10(2) of the *Rooms Act* states the Chief Executive officer is responsible for the human resources, general direction, supervision and control of the finances and other business of the corporation and of the divisions of the corporation, but Mr. Brinton is nevertheless required to do so in accordance with

established rules and practices, which he did not follow when he extended an offer to [REDACTED] in the April – June 2018 time period;

- In September 2018 Carla Foote was identified to Deputy Minister Ted Lomond (who was the Department's representative on the board of directors of the Rooms) as a suitable candidate by Minister Mitchelmore. Minister Mitchelmore's recollection is that Deputy Minister Lomond passed on Ms. Foote's name to CEO Dean Brinton during a September 21, 2018 phone call. Mr. Lomond informed Mr. Brinton that Government wanted Carla Foote to join the Rooms in the lead marketing role in the position of Executive Director of Marketing and Development. While section 10(2) of the *Rooms Act* indicates the CEO is responsible for human resources, it does not preclude Government from putting forward internal candidates thought to be appropriate for particular positions at the Rooms;
- Minister Mitchelmore's understanding is that prior to and during the organizational review of the Rooms, Mr. Brinton had been advocating for the creation of executive-level positions reporting to him at the Rooms and that the creation of the positions of Executive Director of Marketing and Executive Director of Museums and Galleries was supported by Mr. Brinton at the September 27, 2018 Board meeting;
- In September 2018, Ms. Foote was in an executive level position within core Government. At about the same time Ms. Foote's name was raised, Mr. Brinton requested for [REDACTED] to move into an executive level position. [REDACTED] had been filling both the role of Director of Museums and the Director of Galleries up to that point and had been receiving an executive level of compensation for many months. Minister Mitchelmore's understanding is that it was deemed appropriate to create executive level positions for both [REDACTED] and Ms. Foote and that Mr. Brinton and the Board of the Rooms approved the creation of these two executive level positions – the Executive Director of Museums and Galleries and the Executive Director of Marketing and Development;
- It is important to note that the Rooms is unlike other Government agencies, boards and commissions insofar as Rooms employees are compensated on the same pay scale as core Government employees and all hires at the Rooms require a Request for Staffing ("RFS") form to be submitted to and then signed by the Minister. Minister Mitchelmore is unaware of the origin or basis for the requirement that the Minister sign all RFSs, but is aware that he signs an RFS before any individual commences employment at the Rooms;
- The appointment of Carla Foote to the position of Executive Director of Marketing and Development at the Rooms could not have happened without a RFS form signed by CEO Dean Brinton being submitted to Minister Mitchelmore. While Minister Mitchelmore now understands (through the course of the investigation) that Mr. Brinton's current position is that he did not support the creation of the Executive-level positions at the Rooms, that is inconsistent with Minister Mitchelmore's understanding of Mr. Brinton's position in and prior to September 2018;

- On or about September 26, 2018, Minister Mitchelmore received an RFS form identifying Carla Foote for the position of Executive Director of Marketing and Development, signed by CEO Dean Brinton. This form was submitted to Minister Mitchelmore for his approval and he signed it indicating his approval;
- While Minister Mitchelmore is aware Ms. Foote's hiring has been questioned in the media on the basis of political connections and political patronage, Minister Mitchelmore points out that Ms. Foote was not unemployed before moving to the Rooms. She was occupying an executive level position within Government. In terms of the choice of Carla Foote for the lead marketing role at the Rooms, Minister Mitchelmore's belief is that she is suitably qualified based on her experience and background in various marketing and communications roles, as well as her knowledge and experience working in a communications capacity within core Government. As well, Ms. Foote's appointment was appropriate and made in accordance with section 13 of the *Public Service Commission Act*, which states:

Merit principles

13. (1) Recommendations for appointments to and promotions within the public service shall be based on merit principles and made by the commission through competitive written examination or by other processes of personnel selection designated to establish the merit of candidates that the commission considers are in the best interests of the public service.

Minister Mitchelmore strongly denies the allegation that "generally accepted human resources practices, including the application of the merit principle to hiring within the public service" were not followed in relation to Carla Foote. As already stated, it is common for there to be lateral moves at the Executive level within Government without an external job competition. Section 13 of the *Public Service Commission Act* indicates that the merit principles can be satisfied by "other processes of personnel selection designated to establish the merit of candidates". While steps like the creation of job descriptions, job advertisements, receipt of applications, interviews, etc. are common within Government when hiring externally, it is common for such steps not to be taken in the case of lateral internal transfers within Government when an internal candidate's merit and abilities are already known. In the case of the lead marketing role at the Rooms, Government felt it would be beneficial if the candidate had not only marketing and communications skills, but also a connection with core Government and experience with the inner workings of Government since the Rooms mandate and activities overlap with several Government departments and initiatives, including tourism, culture, advanced education, etc.;

- While we will elaborate under our response to allegation c) below, we point out now that Ms. Foote was not given a pay raise when she moved into the lead marketing role at the Rooms. She was essentially red circled when she moved into the Executive Director of Marketing role. The Executive Director level positions at the Rooms are equivalent to Assistant Deputy Minister positions within core Government and are also equivalent to Ms. Foote's former position as Associate Secretary to Cabinet (Communications);
- It is common practice for there to be lateral moves within Government at the Executive level without a job competition if a suitable internal candidate is identified. It is also common for candidates who move laterally to maintain the level of compensation they had in their previous position;
- Carla Foote's transfer into the position of Executive Director of Marketing and Development at the Rooms could not have happened without the approval of Rooms CEO, Dean Brinton. If Mr. Brinton or the Board disagreed with Ms. Foote's hiring in September 2018, that disagreement was not made known to Minister Mitchelmore at the time.

Allegation b) - during the relevant timeframe, Minister Mitchelmore directed staff at the Rooms to rescind a valid negotiated contract for a person to act as Director of Marketing and Development so as to facilitate the eventual hire of Ms. Carla Foote as Executive Director of Marketing and Development

In response to allegation b), Minister Mitchelmore denies he directed staff to rescind a valid negotiated contract. However, Minister Mitchelmore does not deny that in June 2018 he directed Mr. Brinton to withdraw an invalid offer of employment Mr. Brinton had made to [REDACTED] to assume the role of Director of Marketing. This offer was not valid as there had been no Request for Staffing form submitted to Minister Mitchelmore nor had Mr. Brinton followed human resources practices applicable to the hiring of external candidates. In this regard, Mr. Brinton not only acted outside his authority in making this offer, but also proceeded to make this offer to an external person after being informed by Minister Mitchelmore in March 2018 that there were likely internal candidates within Government who would be suitable for the lead marketing role at the Rooms. Despite being informed of this by Minister Mitchelmore, it appears evident from the series of emails you sent us with your March 7, 2019 letter, that Mr. Brinton began unilaterally recruiting his own external candidate sometime around April 15, 2018, shortly after being informed by Minister Mitchelmore of the likely existence of suitable internal Government candidates. Inconsistent with established human resources practices for external hires, Mr. Brinton did not confer with Government's human resources, did not run a job ad, and did not prepare a Request for Staffing form for the Minister to sign. The offer made to [REDACTED] by Mr. Brinton was invalid. To the extent retracting that invalid offer results in legal liability, it is a result of Mr. Brinton's actions.

Allegation c) - Minister Mitchelmore instructed staff to set the salary of the Executive Director of Marketing to which Ms. Foote was appointed, at \$132,000, far exceeding the salary generally provided for in the vacant Director of Marketing and Development position at the Rooms, thereby grossly mismanaging public funds

In response to allegation c), Minister Mitchelmore denies he instructed staff to set the salary of the Executive Director of Marketing and Development, to which Ms. Foote was appointed, at \$132,000. To the extent Mr. Brinton and the Board "felt that they were under a direct order from [Minister Mitchelmore]...to approve the contract..." for Ms. Foote as is referenced on page 9 of your February 18, 2019 letter, Minister Mitchelmore acknowledges his desire was for Ms. Foote to move into that position, but states he gave no such order to Mr. Brinton or to the Board. Ms. Foote moved laterally from the Executive level position of Associate Secretary to Cabinet (Communications), reporting to the Premier, into an executive level position at the Rooms and because it was a lateral move, her salary did not change. As stated previously, it is common within Government for individuals to maintain his/her compensation when moving laterally from one position into another equivalent position.

Allegation d) - Minister Mitchelmore directed staff of the Rooms to delete emails in contradiction of best practices for document storage and contrary to law

In response to allegation d), Minister Mitchelmore denies he directed staff to delete emails and submits there is absolutely no evidence of which he is aware that he did so.

Allegation e) - Generally, Minister Mitchelmore's involvement in the hiring of Ms. Carla Foote undermined the reputation of the Rooms and its abilities to carry out its objects and purposes

Minister Mitchelmore denies the allegation. Furthermore, Minister Mitchelmore disagrees that Ms. Foote's transfer into the position of Executive Director of Marketing and Development undermined the reputation of the Rooms or its abilities to carry out its objects and purposes and states there is no evidence of this.

On page 13 of your February 18, 2019 letter reference is made to the apparent view of the Board that damage was done to the Rooms on three levels. First, Minister Mitchelmore questions whether such concerns are held by the entire Board. Second, regarding the feeling that the Rooms' credibility has been damaged with donors and funding agencies and with the general public, arts community and volunteers, such views are presumably based on hearsay and unreliable conjecture on the part of those who disagree with Ms. Foote's hiring. There is no evidence to support such speculation and it is not possible for Minister Mitchelmore to disprove subjective beliefs. Regarding the allegation of interference with the autonomy of the Board, Minister Mitchelmore denies directing them or mandating them to do anything, including hire Ms. Foote. While Government was in favour of Ms. Foote moving into that position, the Board's meeting minutes of September 27, 2018 do not indicate an objection with the creation of two

executive level positions nor do they indicate an objection with Carla Foote moving into the position of Executive Director of Marketing and Development.

We point out the standard applied by the Public Sector Integrity Commissioner of Canada is whether the action "creates a substantial risk of significant adverse impact upon the ability of an organization, office or unit to carry out its mandate". There is no evidence this threshold has been met by the complainant(s). In fact, we submit the complaints fall far short of this threshold.

Overall, in terms of the guidelines followed by the Public Sector Integrity Commissioner of Canada when assessing whether there has been "Gross Mismanagement", as explained throughout this letter, there is nothing we are aware of that would amount to gross mismanagement on the part of Minister Mitchelmore, whether through a breach of the Code of Conduct or otherwise. We respectfully submit that to find otherwise would require you to reach conclusions based on a grossly insufficient evidentiary basis and would unfairly besmirch the reputation of a Minister of the Crown based on what appears to be nothing more than a difference of opinion.

Once you have reviewed the above, please do not hesitate to contact me if you have any questions.

Yours truly,

WADDEN PEDDIGREW HOGAN

Chris Peddigrew



CP/tg

APPENDIX E

A draft letter for Dean Brinton's Signature
to A.B., dated June 15, 2018.

ELECTRONIC MAIL

June 15, 2018



Dear 

Further to our telephone conversation today, this is to advise that our offer of contractual employment with The Rooms Corporation is hereby revoked effective immediately.

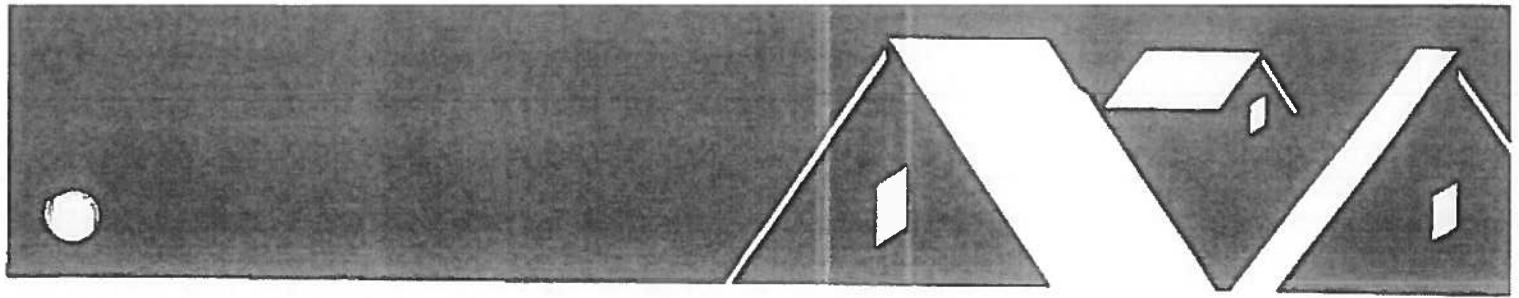
Sincerely,

DEAN BRINTON
Chief Executive Officer

cc: Ted Lomond
Deputy Minister, TCII

APPENDIX F

A Sample of The Rooms Standard Letterhead.



9 Bonaventure Avenue | PO Box 1800 | St. John's, NL | Canada A1C 5P9
t: 709 757 8000 | f: 709 757 8017 | www.therooms.ca

APPENDIX G

The Presentation Given to The Rooms' Board of Directors
on the Reorganization of The Rooms by a Sub-Committee
of the Board on September 21, 2018.

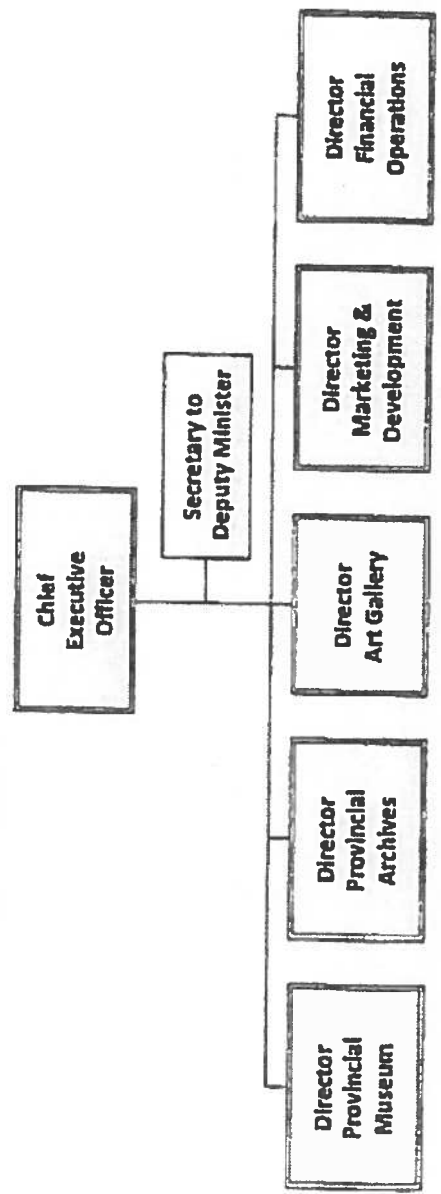


The Rooms Reorganization

Presented to: The Rooms Board of Directors
September 21, 2018

Background

- The Rooms Act established a structure for The Rooms that required three divisions, each led by a Director:
 - Provincial Archives
 - Provincial Museum
 - Provincial Art Gallery
- The Board could establish other divisions as required for the administration and operation of the corporation.
- The current structure of The Rooms Corporation consists of 5 Divisions as outlined below.



Background

- The *Rooms Act, 2016* (still to be proclaimed) removed the requirement to have separate divisions for the Museum, Art Gallery and Archives.
- This change has allowed The Rooms Board and its executive an opportunity to revisit the structure of the organization to align it with the strategic plan and improve operational efficiency.

Strategic Plan

- Three Strategic Priorities:
 - Generate Engaging Content
 - Deepen, Broaden and Increase Public Engagement
 - Governance and Stewardship of Provincial Assets

- While fulfilling its core mandate, The Rooms is committed to:
 - Increasing visitation and earned revenue
 - Supporting the Province's tourism marketing strategy
 - Creating a more efficient and effective organization
 - Achieving greater financial stability and overall self-sufficiency

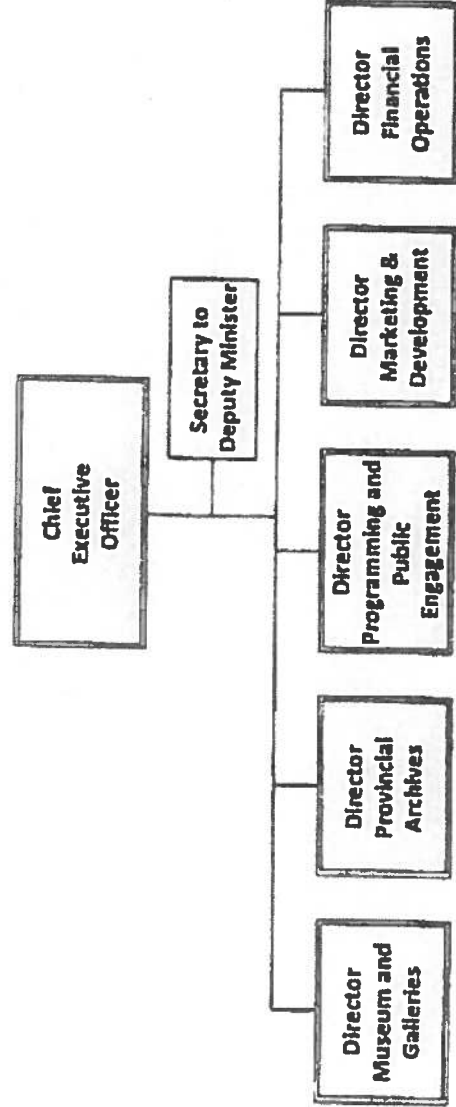
- The ultimate goal is to create a more entrepreneurial organization able to generate the revenue necessary to cover its increasing operating costs without having to rely on funding increases from GNL.

Restructuring Principles

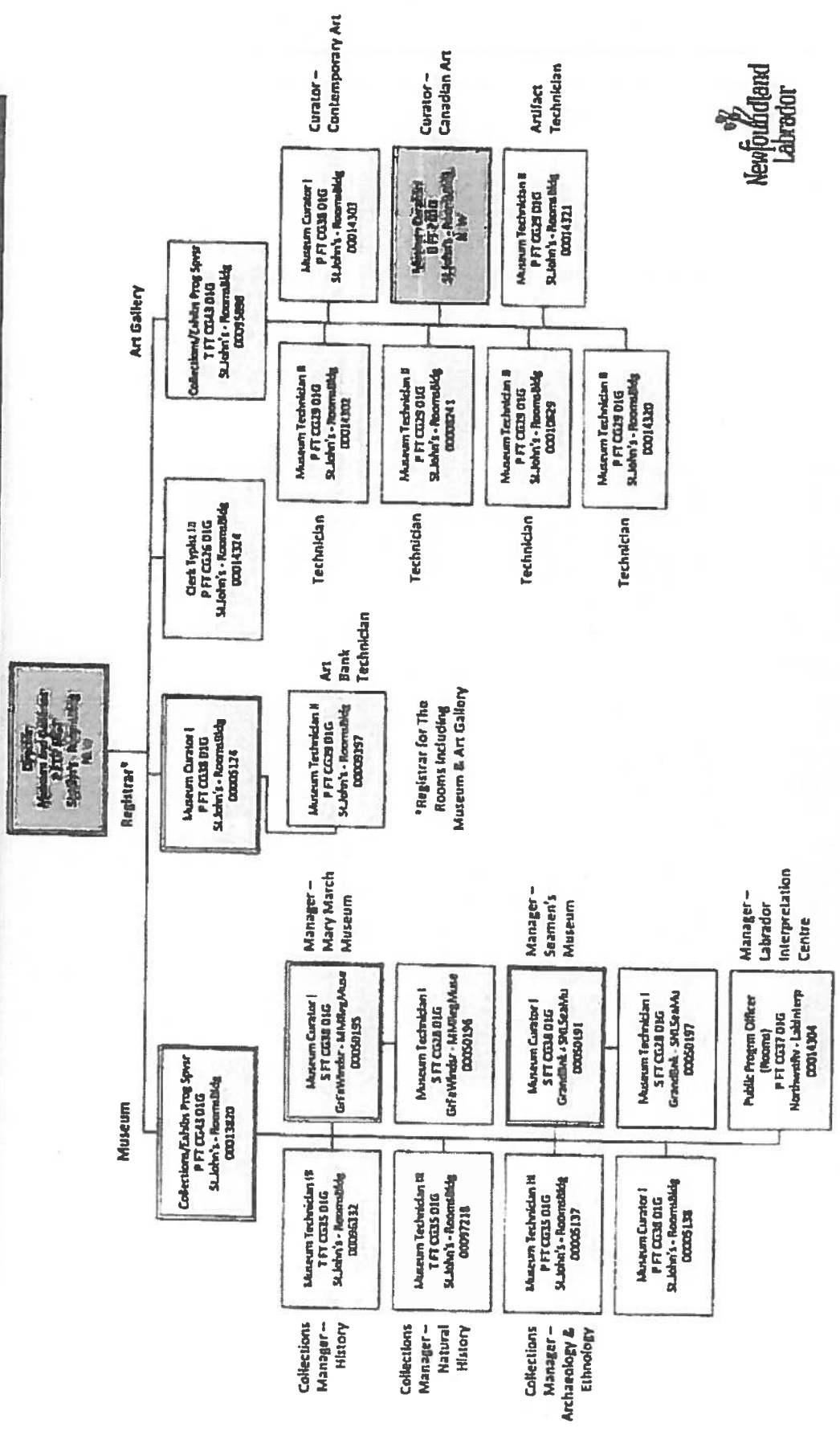
- No impact to current long-term employees – implemented through attrition
 - A small number of temporary assignments and contracts will not be renewed
- Proposed structure is fully funded – no additional funding is required
 - New positions will be created/staffed as vacancies and funding allows
 - Includes \$60,000 2018-19 attrition reduction
 - Includes a small allowance for potential reclassifications
- New permanent positions will be created and classified in accordance with applicable collective agreements and HRS policies.
- The Rooms will work with the Staffing Division of the HRS to conduct a merit based recruitment and selection process when staffing the organizational structure.

Proposed Structure

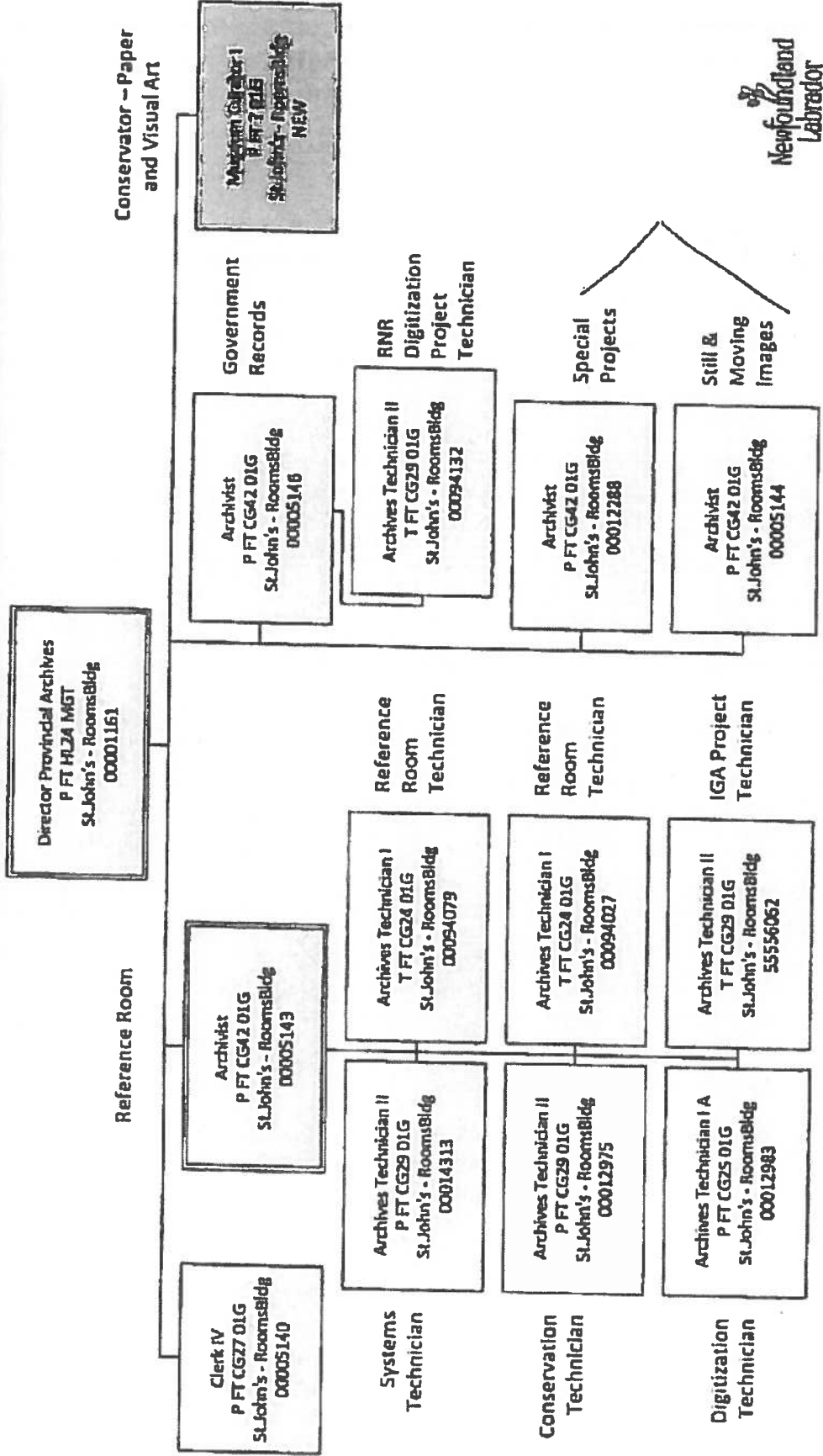
- The proposed structure consists of 5 Divisions
 - Provincial Museum and Art Gallery have been combined under one Director
 - A new division of Programming and Public Engagement has been created
 - There have been minor changes to the scope of Provincial Archives; Financial Operations; and Marketing and Development divisions



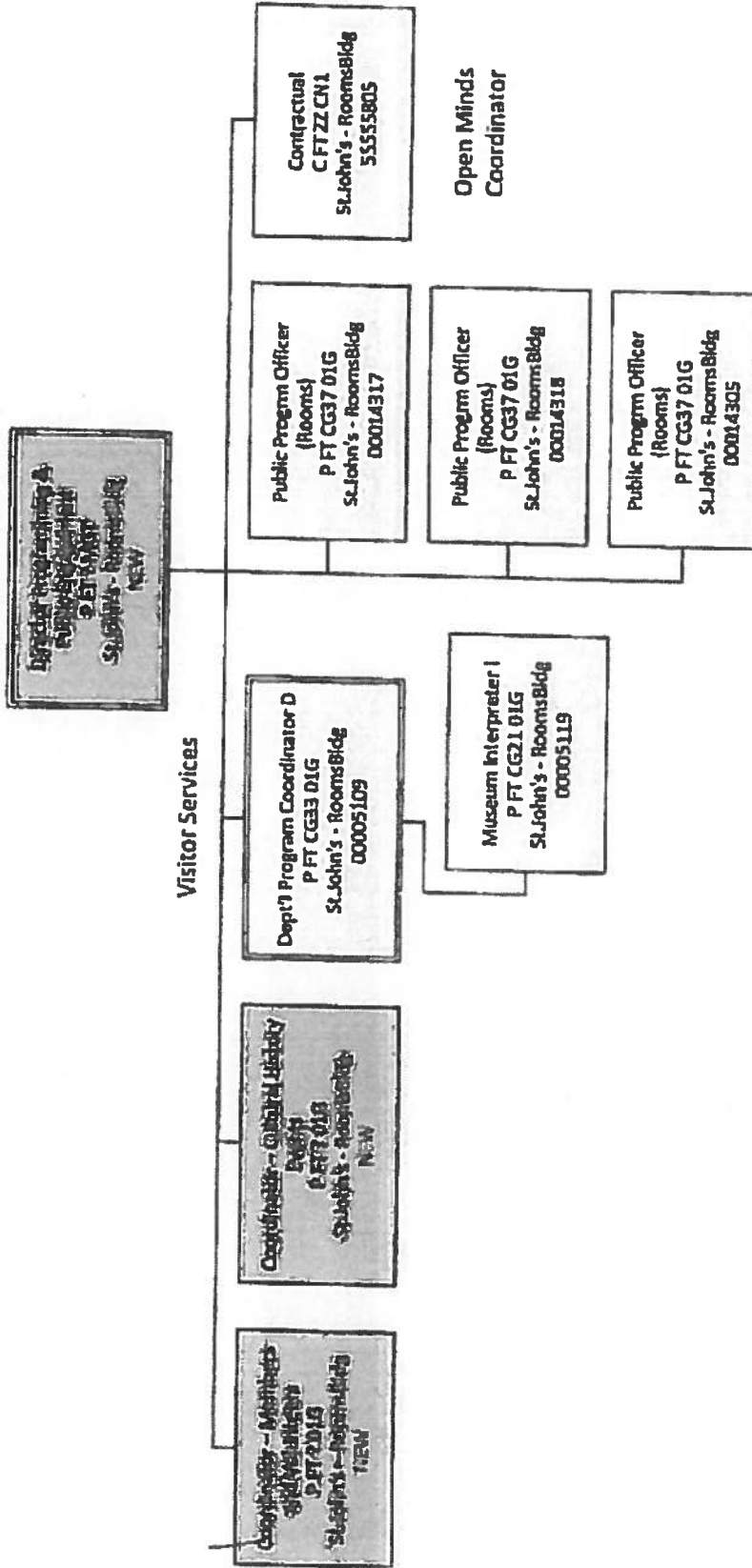
Museum and Galleries



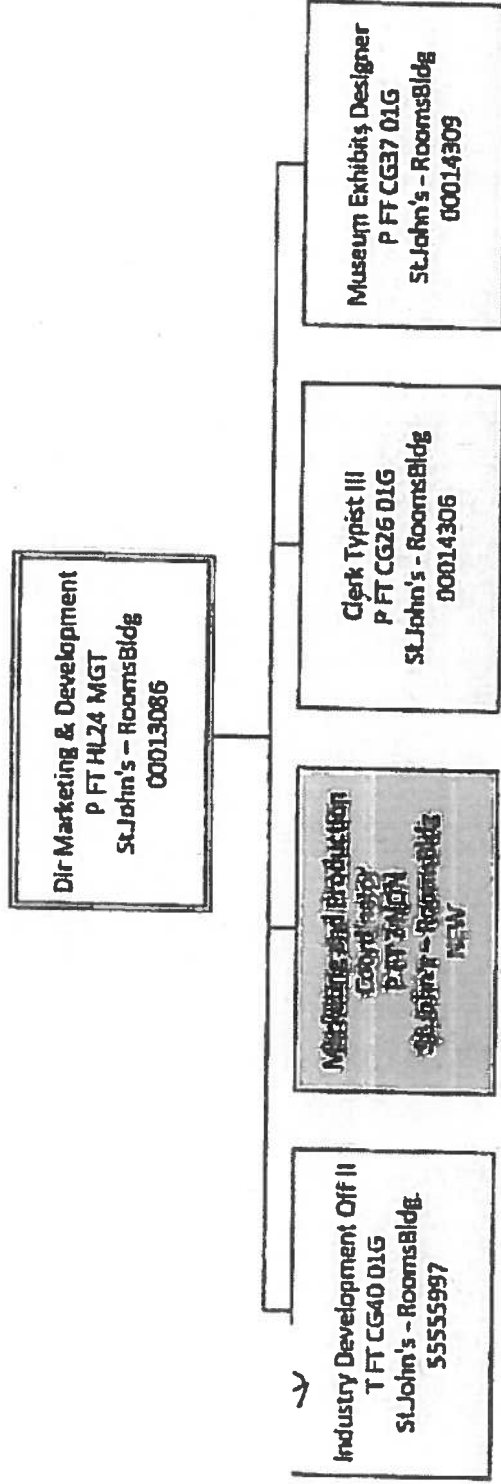
Provincial Archives



Programming & Public Engagement

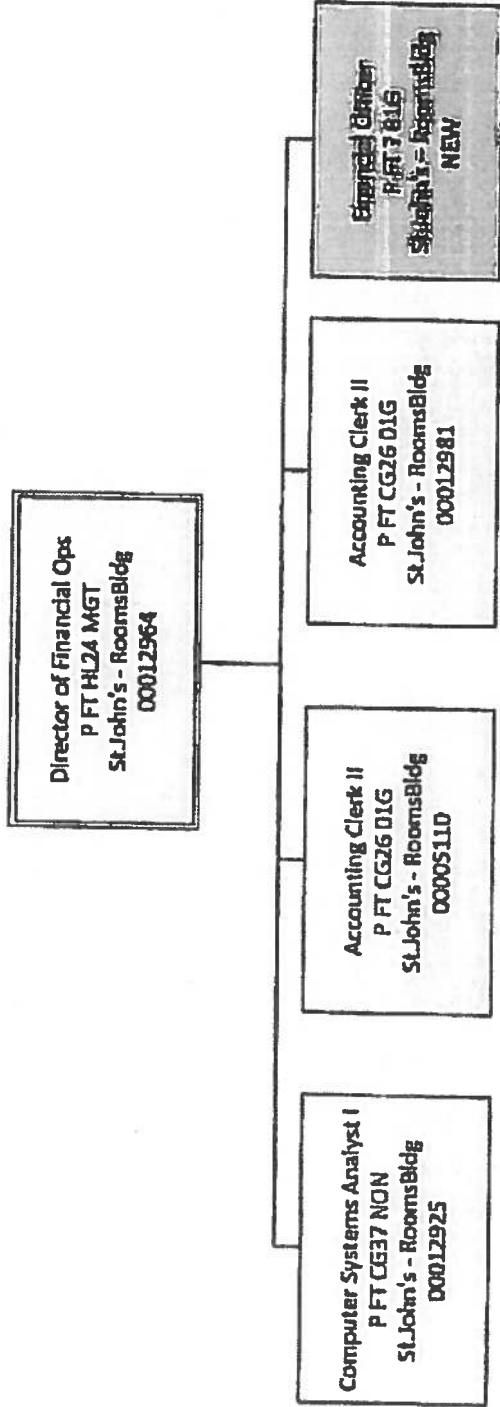


Marketing & Development



Combined graphics
artist and exhibits
designer for The Rooms

Financial Operations



IT/ATIPPA

Employee Impacts

- Only those employees in redundant positions who are on temporary assignment or in a contractual arrangement will be given notice that those positions are no longer required.
- It is anticipated that only 6 employees will receive this notification:
 - 2 employees will return to their previous positions
 - 4 employees do not have a position to return to
 - 3 of these employees will have internal status for 24 months to compete on internal competitions within government which includes The Rooms
- Where appropriate impacted employees may be assessed for restricted competitions for any of the new positions being created in accordance with the PSC restructuring policy.

Benefits of the New Structure

Over the next 5 years:

- Increase visitation from 125,000 visitors per year to 175,000
- Increase earned revenue by 40% from admissions; gift shop sales, rentals, parking, and food and beverage services
- Add approximately \$500,000 to The Room's bottom line annually
- Reduce dependency on GNL funding
- Better support the Province's tourism marketing strategy
- Create a more efficient and effective organization

APPENDIX H

**Request for Staffing Action Forms Signed by
Minister Mitchelmore and Dean Brinton for
New Executive Positions in
September and October 2018.**

Request for Staffing Action

This form must be completed by the hiring department and emailed to the appropriate RSA submission address for the sector

I. Position Data

Classification Title: Executive Director PCN: TBC Pay Scale: EP 14
 Position Group: Executive Funding: Temporary
 Division: Executive Support Department: The Rooms Corporation of NL
 Location: St. John's Building: The Rooms
 Reason for Staffing: Newly created position Request Date: Sep 26, 2018
 Requesting Director: _____ Telephone: _____
 Direct Supervisor: Dean Brinton, CEO Telephone: _____
 Comments: _____

II. Type of Action (Please select only one action per RSA)

- Recruitment Action
 Payroll Action

Payroll Action Type: Hire - Contractual Employment
 Permanent Incumbent: _____ N/A
 Is position vacant? _____ Date vacated: _____ New Position
 If Vacant, what is name of previous incumbent? N/A
 If Not Vacant, what is name of temporary incumbent? Carla Foote
 If Not Vacant, what is status of temporary incumbent? Contractual Employment
 If Not Vacant, date temporary incumbent started in position? _____
 Payroll Action Start Date: Oct 1, 2018 Payroll Action End Date: _____
 Student Hire

III. Funding Information

Funding Source: Departmental Salary Plan 100% Dept. Controller Initials: _____
 This position is: Budgeted (allocated through budget process, vetted through estimates and listed in salary details)
 Budget Flex (funding source derived from vacancy of a budgeted position)
 Position Title: _____ PCN: _____

Request for Staffing Action

This form must be completed by the hiring department and emailed to the appropriate RSA submission address for the sector

I. Position Data

Classification Title: Executive Director of Museum and Galleries PCN: _____ Pay Scale: _____
 Position Group: Management Funding: Temporary
 Division: Museum and Art Galleries Division Department: The Rooms Corporation of NL
 Location: St. John's Building: The Rooms, 9 Bonaventure Ave
 Reason for Staffing: Employment end date must be extended Request Date: Oct 29, 2018
 Requesting Director: Dean Brinlon Telephone: 709-890-1347
 Direct Supervisor: Dean Brinlon Telephone: 709-890-1347
 Comments: Contractual position for Anne Chale

II. Type of Action (Please select only one action per RSA)

- Recruitment Action
 Payroll Action

Payroll Action Type: Hire - Contractual Employment
 Permanent Incumbent: _____ N/A
 Is position vacant? Position Vacant (Nobody in role) Date vacated: _____ New Position
 If Vacant, what is name of previous incumbent? _____
 If Not Vacant, what is name of temporary incumbent? _____
 If Not Vacant, what is status of temporary incumbent? _____
 If Not Vacant, date temporary incumbent started in position? _____
 Payroll Action Start Date: Oct 29, 2018 Payroll Action End Date: Mar 31, 2019

- Student Hire

III. Funding Information

Funding Source: Departmental Salary Plan 100% DepL Controller Initials: _____
 This position is: Budgeted (allocated through budget process, vetted through estimates and listed in salary details)
 Budget Flex (funding source derived from vacancy of a budgeted position)
 Position Title: Director, Provincial Museums PCN: 00010461

Accounting Flex Field:

Company	RC	Appropriation	Activity	Line	Tracking	Future	% of Total
01	2834	160	84v0	1070	00000000		100

IV. Rationale for Staffing

Please provide a detailed explanation which includes rationale for staffing; how a short- or long-term vacancy will impact operations and why this position needs to be filled at this time; whether hard-to-fill (list the examples); and if there are no other similar positions or no ability to redistribute duties of this vacancy elsewhere (include any supporting metrics or transaction data).

In addition to the duties of the Director of the Provincial Museum Division of The Rooms Corporation, this position will also take over the duties of the Director of the Provincial Art Gallery Division. The latter position will remain vacant (the previous Director resigned June, 2017). As well, this position will be the back-up position to the CEO of the organization.

The salary savings from combining these two position will allow additional curatorial capacity and exhibition funding at The Rooms and its regional museums, thereby supporting The Rooms 2017-2020 Strategic Plan with its emphasis on increased visitation and earned revenue, have approved these changes.

The Board of Directors of The Rooms Corporation and the Minister of Tourism, Culture, Industry and Innovation, Christopher Mitchelmore, have approved these changes.

V. Authorization

Assistant Deputy Minister:

(Name - Please Print) (Signature) (Date)

Deputy Minister:

This request has been considered and approved in the context of our current HR Attrition Management Plan (employee count and fiscal targets).

Dean Brinton
(Name - Please Print) (Signature) (Date)

Minister:

Christopher Mitchelmore
(Name - Please Print) (Signature) (Date)

After all approval signatures have been acquired, please email this document to the the RSA submission address for your sector. If you need to confirm the correct address, please call your Staffing Services Consultant.

FOR STRATEGIC STAFFING DIVISION USE ONLY

This request is now recommended for: Recruitment Action Payroll Action Student Hire

Date Logged in SSU: _____ SSU Tracking Code: _____

Date Submitted to SSD: _____ Successful Candidates: _____

Date Submitted to C&B: _____

APPENDIX I

Press Release January 14, 2016, with
Backgrounder for Carla Foote.

experience in quality assurance, operations management, human resource management and new product development. Mr. Ploughman completed both his bachelor's degree in engineering and graduate degree in business administration at Memorial University.

Carla Foote

Carla Foote has served as Director of Communications in the Office of the Official Opposition for three years. She has spent the last 18 years in the communications sector working with public sector, not-for-profit and private industry. Ms. Foote has provided strategic communications advice to a variety of sectors from education and health care to Aboriginal groups, and the oil and gas industry. In addition to studying Political Science at Memorial University, she is a graduate of the Broadcast Communications program at the British Columbia Institute of Technology. Ms. Foote is a former executive member of the Canadian Public Relations Society - Newfoundland and Labrador, and a recipient of Rotary International's Paul Harris Fellowship.

Tracy King

Tracy King began her career with the Government of Newfoundland and Labrador in 2000. Since 2012 she has been the Assistant Secretary to Cabinet (Social Policy). Previous to this position, she worked in the Department of Health and Community Services as Assistant Deputy Minister (Policy and Planning). Ms. King has held a variety of policy-related positions with the Departments of Justice, Fisheries and Aquaculture, Labrador and Aboriginal Affairs, Health and Community Services and the Intergovernmental Affairs Secretariat and Cabinet Secretariat. Ms. King holds a Bachelor of Arts in political science and a certificate in public administration from Memorial University.

Elizabeth Day

Elizabeth Day has been employed with the Newfoundland and Labrador public service for 31 years. She is currently an Assistant Deputy Minister in the Department of Seniors, Wellness and Social Development with responsibility for Seniors and Aging, Poverty Reduction, Disability Policy and Adult Protection. She has held previous executive positions in the Department of Advanced Education and Skills and the Office of Public Engagement. Ms. Day has held director positions within Service NL, and Child, Youth and Family Services and has had progressive leadership responsibilities in the areas of legislative and policy development, program supervision, project management, staff development and training and horizontal government initiatives. She was awarded the title Fellow of the School of Graduate Studies from Memorial University of Newfoundland (April 2000) in recognition of continued academic excellence throughout a graduate program. Ms. Day holds the degrees of Master of Social Work and Bachelor of Social Work from Memorial University and is a registered social worker with the Newfoundland and Labrador Association of Social Workers.

Debbie Dunphy

Debbie Dunphy joined the Government of Newfoundland and Labrador in 1997 as a Tax Compliance Officer with the Department of Finance. Since that time, she has held positions in several departments including Executive Council, and Government Services and Lands. In 2005, she accepted the position of Manager of Budgeting with the Department of Justice and Public Safety and subsequently moved into the Departmental Controller's position in 2007. In November 2015, she was appointed Assistant Deputy Minister (Acting) of Strategic and Corporate Services. Ms. Dunphy holds a Diploma in Business Management Accounting from the College of the North Atlantic and is a Chartered Professional Accountant.

Fiona Langor

Fiona Langor has been employed with the Provincial Government since 1994 and has held positions with the former Department of Industry, Trade and Technology, former Department of Business, and Executive Council. Most recently she served as Director of Policy and Strategic Planning with the Department of Justice and Public Safety. Prior to her employment with the Provincial Government, Ms. Langor spent four years with the Faculty of Business at Memorial University. She holds a Bachelor of Commerce (Co-operative) degree from Memorial University.

2016 01 14

3 05 p.m.

APPENDIX J

Instructions for Completing the Request
for Staffing Action Form.

Instructions for completing the Request for Staffing Action form

General Guidelines

1. This form must be completed to authorize a staffing action, including recruiting a vacant position, extending an existing employee, hiring a student and/or to initiating other types of payroll transactions.
2. The RSA form is designed to be used electronically with drop-down boxes embedded scripting to facilitate its completion. Printing this form to complete manually is not recommended.
3. Please ensure the RSA form is complete (including authorization signatures) before forwarding to Strategic Staffing Division.

Instructions

Section I: Position Data

The Management Contact is responsible for completing this section of the form in full. RSAs received with incomplete or inaccurate information cannot be processed, creating a delay. Please contact your Staffing Services Consultant – Strategic Staffing Division should you require clarification or assistance regarding the RSA.

Section II: Type of Action

The Management Contact is responsible for completing this section of the form in full. There are three categories of staffing actions; Recruitment, Payroll and Student. Only one category can be selected per RSA and the fields presented on the form will be dependent on the category selected. Please avail of your Staffing Services Consultant to help identify the most effective option for filling a vacancy.

Section III: Funding Information

The Management Contact is responsible for completing this section in consultation with the Departmental Controller. There is space provided on the form for the Controller to initial their approval. This practice is optional based on departmental authorization processes.

Please note that there are two options available to specify a position's funding type. Select either:

- Budget (funding allocated through budget process, vetted through estimates and listed in salary details)
- Budget Flex (funding source derived from vacancy of a budgeted position). If this option is selected, additional fields will appear and the associated position title and PCN has to be identified.

If more than one source of funding is identified for the position, the '+' box can be clicked to add an additional accounting flex field. The Management Contact must indicate the percentage of funding that is to be taken from each funding source (e.g. Opening Doors 80%).

Accounting Flex Field:

Company	RC	Appropriation	Activity	Line	Tracking	Future	% of Total	
01	3100	100	1780	0110	00000000	0000	50	+
01	3300	100	1830	0110	00000000	0000	25	+
								+

The + button will add an Accounting Flex Field

The - button will subtract an Accounting Flex Field

Section IV: Rationale for Staffing

The Management Contact is responsible for completing this section of the form. This section must be completed for all RSAs and should articulate why the position needs to be filled at this time and the potential impacts of not proceeding.

Section V: Authorization

Assistant Deputy Minister

It is the responsibility of the Assistant Deputy Minister (ADM) to review the request, including the associated rationale, and provide a recommendation regarding whether the RSA should be approved. If the ADM has questions arising, s/he should contact the applicable 'Management Contact' to clarify issues before proceeding to the Deputy Minister.

Deputy Minister

It is the responsibility of the Deputy Minister (DM) to ensure that the request contains sufficient information and rationale to justify staffing the position.

Where there is delegated authority in place for the DM to approve the RSA, the appropriate selection will identify this authority and the RSA can be submitted to Strategic Staffing Division via the appropriate mailbox for that Sector.

Where there is no delegated authority, the DM will provide a recommendation regarding whether the RSA should be approved. If the DM has questions arising, s/he should contact the applicable ADM to clarify issues before proceeding to the Minister.

Minister

If the Minister is satisfied that the request contains sufficient information and rationale to justify staffing the position, the Minister may approve the RSA. It and it can then be submitted to Strategic Staffing Division via the appropriate mailbox for that Sector.

Please note: It is strongly recommended that the position within the Department responsible for submitting the request to Strategic Staffing Division is also responsible for copying the Management Contact who initiated the RSA.

Section VI: HRS Verification

It is the responsibility of Strategic Staffing Division to ensure the received RSA has been completed accurately. Strategic Staffing Division will also ensure that the request is in compliance with all staffing-related legislation, policies and collective agreement provisions.

APPENDIX K

Competition Summary: Director of Marketing and Development.

Positon: Director of Marketing and Development

Salary: \$76,866 - \$99,925 (HL-24)

Screening Date: Nov/2016

of Applicants: 77

Summary:

- Three applicants were screened in and interviews were scheduled for Nov. 16, 2016.
- On Nov.29, 2016, email from Dean Brinton to PSC cancelling the competition *"until we have a better sense of our 2017-18 budget."*
- Candidates were interviewed but no matrix or notes completed before cancellation.
- PSC representative stated that *"during the assessment of candidates interviewed DB indicated the potential changes to that position-therefore it was cancelled before completing the matrix."*

Education Stats:

Masters: 21

Bachelors: 40

Diploma: 9

Certificates/other: 7

There were five **"must have"/ "mandatory"** criteria for the screening process:

- *Experience leading the development of marketing and communication Plans*
- *Experience with brand development and management*
- *Experience managing financial resources*
- *Experience managing human resources*
- *Completion of an undergraduate degree in business or commerce (equivalencies will be considered).*

It appears that if a candidate didn't meet all five criteria, they were screened out of the competition.

Three Screened In Candidates that were interviewed:

Applicant # 5

Met all five *must have* criteria.

Education: M.B.A., B.B.A.

HIGHLIGHTS:

- "8 years of project management, marketing and communications experience at various levels of management."
- Manager of External Relations and Engagement – [REDACTED]
[REDACTED]
- Special Projects Coordinator- [REDACTED]
- Project Coordinator/Sales Marketing Assistant- [REDACTED]
[REDACTED]
- [REDACTED] Candidate Campaign Assistant – [REDACTED]

Applicant # 44

Met all five *must have* criteria.

Education: M.A. Museum Studies, B.A. History

HIGHLIGHTS:

- "Over 16 Years progressive leadership experience in the museum industry; most recently at one of the top revenue generating museums in the country"
- "More than 12 years' experience successfully developing and executing communications and marketing plans."
- "Led a marketing and communications strategy that resulted in a 126% increase of visitation at the [REDACTED] in five years, including a record breaking attendance of \$480,000 visitors from 138 countries in 2015.
- "Managed the development of branded and general product, generating over \$3 million revenue"
- Director, Exhibits & Communications- [REDACTED]
[REDACTED]
- Head, Strategic Initiatives- [REDACTED]
[REDACTED]

Applicant # 70

Met all five *must have* criteria.

Education: M.B.A., B.K (Kinesiology)

HIGHLIGHTS:

- Board Manager, [REDACTED]
- Manager, Policy and Communications, [REDACTED]



APPENDIX B:

**Citizen's Representative Report
Addendum, July 29, 2019**



Office of the Citizens' Representative
Province of Newfoundland and Labrador

4th Floor, Beothuck Building, 20 Crosbie Place, P.O. Box 8400, St. John's, NL A1B 3N7
Telephone: (709) 729-7647 Toll Free: 1 (800) 559-0079 Facsimile: (709) 729-7696
Email: citrep@gov.nl.ca Website: www.citizensrep.nl.ca

BY HAND

29 July, 2019

Ms. Sandra Barnes

Clerk of the House of Assembly

Dear Madame Clerk:

RE: Supplemental OCR Public Interest Disclosure report

Pursuant to Section 58(7) of the House of Assembly Accountability, Integrity and Administration Act ("the Act") I submit to you a supplemental report, further to that issued on 11 June 2019. A copy has been provided to the Speaker as anticipated by the Act.

In the intervening period I have had contact with, and accepted submissions from, both the Clerk of the Council and Legal Counsel for the Hon. Christopher Mitchelmore. Both of whom are also receiving copies of this report, in the interest of procedural fairness.

My analysis of these submissions does not lead to any change in the findings contained in the 11 June report. I am reiterating by recommendation that this matter be referred to the Commissioner of Legislative Standards for further review.

My duties under the Act in this matter are now discharged. If you have any questions or concerns in this or any other matter, please contact the undersigned.

Yours Truly,

Bradley J. Moss

Citizens' Representative



**Office of the Citizens' Representative
Newfoundland and Labrador**

**Supplemental Report
of the Citizens' Representative
In the Matter of a**

Public Interest Disclosure

Made Under

Part VI of the House of Assembly

Accountability, Integrity and Administration Act

July 29, 2019

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THE EXECUTIVE COUNCIL'S SUBMISSION	2
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b) Re: Budget Allocation.....	3
c) Re: An Executive Position.....	3
d) Request for Staffing Action Form (RSA).....	4
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APPENDICES

- APPENDIX SR-1:** Letter to the Speaker from the Minister's Legal Counsel.
- APPENDIX SR-2:** Letter to the Speaker from the Citizen's Representative dated June 27, 2019
- APPENDIX SR-3:** Submission from the Executive Council dated July 12, 2019.
- APPENDIX SR-4:** Submission from the Solicitor for Minister Mitchelmore to the Citizens' Representative, dated April 17, 2019.

INTRODUCTION

On June 11, 2019, the Office of the Citizens' Representative ("the OCR") released a confidential public interest disclosure report to both the Honourable Speaker, and the Clerk of the House of Assembly. In the report, we outlined factual findings and conclusions with respect to a public interest disclosure investigation arising from allegations that the Honorable Christopher Mitchelmore ("the Minister") grossly mismanaged his obligations pursuant to his code of conduct in relation to the appointment of Ms. Carla Foote to the position of Executive Director of Marketing and Development with the Rooms Corporation ("The Rooms").

The report concluded that the Minister had, in our view, breached his code of conduct in relation to the appointment process for Ms. Foote, and her placement on the executive pay scale, which exposed the budget of the Rooms to significant extra yearly salary costs. We also conveyed our opinion that the Commissioner of Legislative Standards should review the report as he has the express legal jurisdiction to consider alleged Code violations under subsection 36(1) of the **House of Assembly Accountability, Integrity and Administration Act** ("the Act"), as well as the conventional skills and experience to further adjudicate this matter under the lens of the Code.

On June 19, 2019, we received a copy of a letter to the Speaker from the Minister's Legal Counsel, alleging that the OCR did not provide the Minister with adequate procedural fairness during the course of our investigation (**Appendix SR-1**).

We were on the cusp of replying to the letter when, on June 26, 2019, we received a telephone call from the Clerk of the Executive Council ("the Clerk") advising that she had received a copy of our report from the Speaker, and would like to meet to discuss the possibility of Executive Council filing a submission to clarify certain findings contained in the report. We certainly do not question the Speaker's decision making on where to refer the report after our investigative duties are discharged. The Speaker has clear discretion under the Act to refer a report to the appropriate officials for appropriate action.

We obliged the Clerk's request. During the subsequent meeting on June 27, 2019, we agreed to accept a formal written submission from Executive Council on or before July 12.

Also on June 27 2019, in a letter to the Speaker, we refuted the allegations of a breach of procedural fairness as contained in SR-1 (**Appendix SR-2**), and stated our agreement in writing to accept a submission from Executive Council.

The decision to do so was in keeping with our respect for both the Clerk, and for Executive Council and the vital role it plays as an institution of government. We received the Executive Council's submission on July 12, 2019 (**Appendix SR-3**).

We were subsequently advised by the Minister's Legal Counsel that he would like to file a submission as a result of this submission made by Executive Council. We received that document on July 19, 2019 (**Appendix SR-4**).

What follows in this Supplemental Report is our analysis and assessment of the submissions of Executive Council and the Minister's Legal Counsel.

THE EXECUTIVE COUNCIL'S SUBMISSION

The purpose of the Executive Council's submission was to provide us with broader context regarding the policies and practices with respect to executive staffing across government departments and crown agencies. It culminated in a respectful request to reconsider our findings, which they felt might not have been premised on facts and analysis contained in their submission.

We wish to acknowledge and thank Executive Council for its work in preparing the submission document but its content does not provide a solid basis on which we can alter our findings and recommendations. We come to this conclusion after considering the following issues that arise from Executive Council's commentary:

a) Re: The *Public Service Commission Act* (the "PSC Act")

The *Public Service Commission Act* promotes the merit principle in hiring within the public service. Section 4 of the PSC Act outlines a long list of positions exempted from the PSC Act for the purposes of hiring.

Included in those exemptions are positions compensated under the Executive Pay Plan and contractual positions. Section 2(f) defines contractual employees to mean a person employed for a certain term for the purpose of performing certain specified work, and whose terms and conditions of employment are specifically stated in a written contract.

During our investigation we obtained a copy of Ms. Foote's contract with The Rooms. Unlike the (then) CEO's contract for a term of five years, Ms. Foote's contract is unquestionably open ended, and for unknown reasons is described as "renewable." In any event, there is no specific term in force. In Section 1.3, Ms. Foote is hired from October 1, 2019, until terminated, pursuant to the terms of the agreement. This is not a designated length of time one would attribute to the definition of a "term" in its grammatical, legal or ordinary sense. Rather, the open-ended nature of the contract is akin to what one might find in a contract for a full-time employee.

Therefore, in our view, Ms. Foote is not a "contractual employee" as anticipated by Section 2(f) of the PSC Act. We respectfully disagree with the statement in the Executive Council submission which states, "the PSC Act does not apply to contractual employees per Section 4(n) and no competition was required for that reason."

We are of the view that the only possible way her employment can be exempt from the ambit of the PSC Act is because she is being compensated on the Executive Pay Plan.

b) Re: Budget Allocation

Executive Council submits that the budget allocation for another position at The Rooms was used to fund the employment of Ms. Foote. We wish to point out that the funding for the other position, the Director of Marketing and Development, had a starting (offered) salary in 2018 of \$85,000, topping out eventually at \$105,000. Ms. Foote's salary is \$132,187 and neither the Minister, nor Executive Council, has provided a firm explanation as to where the \$47,000+ salary differential for Ms. Foote's salary comes from. Barring any new evidence, we can only conclude that it has to come from the general operational budget for The Rooms.

This differential represents public funds which could have been used for other purposes to assist The Rooms in fulfilling its mandate or alternatively, returned to the public treasury. This budget allocation issue is compounded further by a lack of anything concrete to compare the (defined) duties of the Director versus the (undefined) duties of the Executive Director. Perhaps they indeed exist, but no one knows what additional services The Rooms can expect to receive for this \$47,000+ annual premium over an \$85,000 Director of Marketing and Development.

c) Re: An Executive Position

Executive Council concurs with our initial assertion that executive positions throughout government are filled by Orders-in-Council. They advise that no executive position was created when Ms. Foote was hired and state "the contractual positions created at The Rooms in 2018 were titled 'Executive Directors' to be consistent with other contractual positions within government and Crown agencies, and the title does not determine whether it is an executive position within the government structure." Executive Council provided examples from the Royal Newfoundland Constabulary, Service NL and the Newfoundland and Labrador Housing Corporation.

As indicated earlier, we have reviewed Ms. Foote's signed contract. In form and substance it is strikingly similar to others we have seen for government executives. Ms. Foote is not only paid on the Executive Pay Plan (reference Section 2.1), but "general salary and step increases applicable to Executive Employees shall apply."

Her travel expenses are reimbursed at rates paid to Executives.

She receives 30 days' paid leave per year akin to Executives.

Contrary to the Minister's repeated public assertions that this was a lateral move, the Executive Council states the Executive Director position is not equivalent to an executive position in government, so it is not considered a lateral move within the government structure.

In sum, if Ms. Foote is not an Executive, than her appointment to the position violates the PSC Act as in our opinion she is not a contractual employee as defined therein. Alternatively, if for argument sake, she does hold an Executive position, then by Executive Council's submission, an Order-in-Council was required for her appointment.

d) Request for Staffing Action Form (RSA)

Executive Council states that RSAs are not always completed and there is no requirement for completion unless the signing authorities are not otherwise satisfied that they have the information they need to determine whether the RSA should be approved.

We are somewhat perplexed by this proposition. Appendix J of our June 11 Report outlines the instructions for completing the RSA. It is a copy of an official document produced by the Strategic Staffing Division of the Human Resource Secretariat of Executive Council. Those instructions indicate that the form must be completed to authorize a staffing action. Under the section entitled "Rationale for Staffing" it notes that this section must be completed for all RSAs and should articulate why the position needs to be filled at this time and the potential impacts of not proceeding. We note that the RSA signed for the Executive Director of Museums and Galleries contained a fully completed "Rationale for Staffing" section. As an ombudsman office, we are generally wary of deviations from explicit policy direction.

In conclusion, we thank Executive Council for its submission. We believe our June 11, 2019, report is premised on a clear understanding of the hiring practices within the public service, and contains a full account of the evidence collected which supports our findings and recommendations. With respect, we will not be changing these findings and recommendations.

Submission of the Minister's Legal Counsel

Having reviewed the July 19, 2019, submission of the Minister's Legal Counsel we state that under our statutory authority we have broad discretion in how we conduct investigations including who to interview. Having access to the necessary publicly available policies and directions on hiring processes at both the Executive Council and PSC level, combined with conventional experience and knowledge in investigating complaints relating to government hiring, we did not deem it necessary during the investigation to compel face-to-face interviews of staff of the Human Resource Secretariat and Executive Council. Nothing in the submissions of Executive Council or the Minister's Legal Counsel alters the foundation for that decision.

As we noted in our letter of June 27 (Appendix SR-2), we provided the Minister with all relevant evidence collected in a timely fashion, outlined the allegations made against him and the implications of same, and we gave him every opportunity to respond. It was not until after the release of the June 11 report that he provided any indications or suggestions that his testimony or submissions would be bolstered by face-to-face interviewing with Executive Council. As a

member of Executive Council (indeed it is only composed of Ministers in office headed by the Lieutenant Governor as Governor-in-Council) he would have had unfettered access at all times to its contextual information and advice from supporting personnel, pre and post interview. Out of respect for the Minister and Counsel, and in the interest of continuing the Minister's access to procedural fairness we accepted and considered additional submissions.

Our function in public interest disclosure is to investigate and report in an unbiased and independent manner, having regard to documentary and testamentary evidence and deliberating using the civil test of balance of probability. Having considered the additional submissions received in the post June 11 period, we will not be altering the findings and recommendations of our initial report, and reiterate a call for review by the Commissioner of Legislative Standards for scrutiny of these issues for potential code violations.

The Office of the Citizens' Representative has discharged its duty as Investigator and is closing this investigation.



Bradley J. Moss

Citizens' Representative

29 July 19

Date

APPENDICES

APPENDIX SR-1

**Letter to the Speaker from
the Minister's Legal Counsel.**

19 June 2019

Via Email: perrytrimper@gov.nl.ca

Speaker of the House of Assembly
P.O. Box 8700
St. John's, NL
A1B 4J6

Attention: The Honourable Perry Trimper, Speaker of the House of Assembly

Dear Minister Trimper:

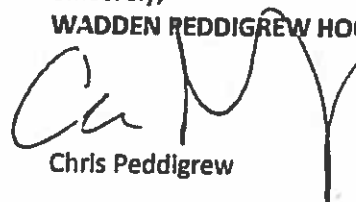
**Re: The Honourable Christopher Mitchelmore
OCR File Number: 3WB19**

We write further to a report of the Office of the Citizen's Representative ("OCR") dated June 11, 2019 arising from a disclosure under the House of Assembly, Accountability and Integrity Act (the "Act"). We would like to advise our client's position is that procedural fairness, as required by the Act, was not followed in the entire OCR process, including in relation to the OCR's decision not to interview the Clerk of the Executive Council or individual(s) with the Human Resources Secretariat. Both the Clerk and Human Resources Secretariat would have information relevant to the investigation in terms of the appropriate processes. As a result, the OCR report contains incomplete information and reaches incorrect conclusions.

We are writing to make you aware of these concerns before any decisions or steps are taken in relation to the OCR report. We request an opportunity on behalf of our client to make submissions to you before any decisions or steps are taken in relation to the OCR Report so as to ensure procedural fairness. Please be advised we have copied the OCR with this letter and we intend to request in writing that it reconsider the thoroughness of its investigation and speak with the Clerk of the Executive Council and a representative of Human Resources Secretariat regarding the disclosure under the Act.

Please do not hesitate to contact me if you have any questions.

Sincerely,
WADDEN REDDIGREW HOGAN





Chris Peddigrew

CP/tg

94 Elizabeth Avenue
2nd Floor, Suite 4
St. John's, NL, A1B 1R8

andrew@wphlaw.ca
chris@wphlaw.ca
john@wphlaw.ca

(709) 576-7464
(709) 700-2159

 WPH_Law
 /wphlaw

**cc: Elizabeth Day - elizabethday@gov.nl.ca
Clerk of the Executive Council**

**cc: Bradley Moss - bradleymoss@gov.nl.ca
Office of the Citizens Representative**

APPENDIX SR-2

Letter to the Speaker from the
Citizen's Representative dated June 27, 2019

APPENDIX SR-2

Letter to the Speaker from the
Citizen's Representative dated June 27, 2019



**Office of the Citizens' Representative
Province of Newfoundland and Labrador**

FILE COPY

4th Floor, Beothuck Building, 20 Crosbie Place, P.O. Box 8400, St. John's, NL A1B 3N7
Telephone: (709) 729-7647 Toll Free: 1 (800) 559-0079 Facsimile: (709) 729-7696
Email: citrep@gov.nl.ca Website: www.citizensrep.nl.ca

BY HAND

27 June, 2019

The Honourable Perry Trimper, MHA
Speaker of the House of Assembly

Dear Speaker:

RE: The Honourable Christopher Mitchelmore

I am in receipt of correspondence to you dated 19 June 2019 from legal counsel for the Honourable Christopher Mitchelmore.

The letter alleges that the OCR did not provide Minister Mitchelmore with procedural fairness because it did not contact the Clerk of the Executive Council or an official from the Human Resources Secretariat.

For the record, on January 4 2019 the OCR wrote the Minister and gave him notice of the commencement of the investigation. That letter specifically mentions the fact that the OCR was investigating the hiring of Ms. Carla Foote at the Rooms. It not only invited, but required, that the Minister provide all documents, papers and things in his possession with respect to that issue. Page 2 of that letter, written by my predecessor, states "I also provide all parties with procedural fairness which means I will unbiasedly assess all evidence you provide and objectively consider any submissions you forward to me."

Counsel for the Minister requested further information in the form of detailed allegations from OCR on February 1 2019, stating in closing "It is our position that the rules of procedural fairness in administrative matters entitle Minister Mitchelmore to such information and an opportunity to reply."

On February 18, 2019 the OCR provided counsel for the Minister with a letter inviting him to make submissions on 13 pages of detailed allegations. That documentation included the particulars of evidence against his client, and possible outcomes for the investigation based on that evidence.

The record shows OCR did not receive a substantive response, even though it was an opportunity to indicate that the Clerk or HRS, or other public officials, had pertinent information relating to any opinion or technical endorsement of the hire at issue in 2018 by the Clerk or HRS.

Counsel's only request following the list of detailed allegations of February 18 was for copies of emails relating to the terminated contract with "AB" as referenced in the report, and Rooms Board of Directors minutes held by OCR. Both were provided on March 7, 2019.

In addition on February 26 2019 we disclosed to counsel, among other things, a summary of material we obtained by subpoena via the Deputy Minister of the Human Resource Secretariat relating to a previous job competition at the Rooms.

On April 9 2019 the Minister was interviewed for approximately one hour. He was asked direct questions about:

- (a) the Request for Staffing Action Form which he signed and is accountable for,
- (b) the process by which Ms. Foote was hired,
- (c) why an Order in Council was not used to facilitate the hire, and
- (d) the decision-making process and rationale that eventually led to Ms. Foote being hired.

The only suggestion made by the Minister during his interview that HRS be contacted by OCR was in the context of highlighting the past hiring practices of the CEO of the Rooms, not the Minister's role in the hiring under investigation or any process associated with that hire:

Q: Is there anything else you'd like to tell me about this whole saga? You've seen the allegations.

A: Yes

Q: Is there anything else I need to know?

A: No. No...all I can say is that throughout this whole process this is not the only issue or incidence of HR concern with the Rooms in terms of how the CEO has looked at hiring, and has been told multiple times about this, and HRS or those within government can certainly highlight where they have had issues or concerns with how the CEO approaches HR matters.

Following the interview, the Minister and his counsel were once again invited to provide submissions, with counsel doing so on April 17 2019. Nowhere in those submissions is reference made to the need for further investigation, or any corroborating witness evidence that may be helpful in establishing, or us understanding, his position about the "appropriate processes" that were cited in his counsel's recent letter.

My review of this request concludes that for a period in excess of six months, if the Minister was aware or became aware that the Clerk of the Executive Council or an official at the Human Resources Secretariat had pertinent evidence speaking to the process he followed in commissioning the hiring under investigation, he was afforded an opportunity to provide it, cite it, or rely on it in testamentary and/or documentary evidence. Indeed, if he had documents or any other form of evidence of direct exchanges whatsoever with the Clerk, HRS, his communications team or any other public or political officials in this matter, at any time material to the period covered by the investigation, he had a duty under law to disclose them.

I conclude the Minister was given meaningful opportunities throughout the process and was permitted at all times to state his case in the manner he saw fit, including during the nine weeks that elapsed between his interview and the issuance of the report.

To date, no one has indicated the probative evidentiary value of conducting the suggested interviews, and the research phase of the investigation did include the acquisition and analysis of, among other things, publicly-available standards for government hiring including the Human Resource Policy Manual, information on position management, human resource planning, and the government employment contract policy.

With all of this being said, today, at the request of the Clerk of Executive Council I met with her and her officials to hear their position in this matter. This was not an interview on the record. By copy of this letter to the Clerk, I am respectfully requesting a written submission from Executive Council by close of business on July 12, 2019. Following an analysis I will again notify you, Mr. Speaker, and the Clerk of the House of Assembly of my opinion.

Please note that the receipt and analysis by me of Executive Council's submission is a courtesy and does not constitute the re-opening of this investigation.

If you have any questions or concerns in this or any other matter, please contact the undersigned.

Yours Truly,

A handwritten signature in black ink, appearing to read 'B. Moss', with a stylized flourish at the end.

Bradley J. Moss

Citizens' Representative

c. Ms. Elizabeth Day – Clerk of the Executive Council

Ms. Sandra Barnes – Clerk of the House of Assembly

Mr. Chris Peddigrew – counsel for the Hon. C. Mitchelmore

APPENDIX SR-3

Submission from the Executive Council
dated July 12, 2019

JUL 19 2019

Government of Newfoundland and Labrador
Executive Council
Clerk of the Executive Council
and Secretary to Cabinet

July 12, 2019

Bradley J. Moss
Office of the Citizens' Representative
4th Floor, Beothuk Building, 20 Crosbie Place,
P.O. Box 8400
St. John's, NL
A1B 3N7

Dear Mr. Moss:

Re: The Honourable Christopher Mitchelmore

I write in relation to our meeting of June 27, 2019 and your correspondence to the Honourable Perry Trimper, MHA, Speaker of the House of Assembly, of the same date.

On June 14, 2019, my office was provided with a copy of the Report of the Citizen's Representative In the Matter of a Public Interest Disclosure Made Under Part VI of the *House of Assembly Accountability, Integrity and Administration Act*, (the "Report").

Upon review of the Report, it became clear that while the Minister is informed on the policy and process for hiring in his areas of responsibility, his statements did not provide information in the broader context regarding the policies and practices with respect to executive staffing across government or Crown agencies. From a practical perspective, officials are relied upon for operational knowledge and to confirm that proposed actions are in accordance with the details of the applicable policies and practices. As a result, several conclusions are made in the Report without the benefit of the broader context that can be provided by Cabinet Secretariat. Specifically, when the Clerk of Executive Council provides direction on executive appointments, the Assistant Deputy Clerk manages the human resource responsibilities for those appointments and movement of existing executive into other positions across government and Crown agencies.

The Report lists facts established by uncontradicted evidence under each allegation and findings. In the "Conclusions on The Findings," it is stated that:

"Minister Mitchelmore grossly mismanaged his obligations with respect to the Code of Conduct given his involvement in the appointment of Ms. Foote to The Rooms and the setting, or permitting to be set, her salary at \$132,000."

I requested a meeting with you to express concern that erroneous conclusions were relied on to support a finding of gross mismanagement on the part of the Minister and you subsequently agreed to accept a written submission on these matters. The following information is provided to identify and clarify the policies and practices referenced in the Report for your consideration.

Allegations and Findings of Fact

The findings of fact that are of concern are relied on predominantly in the discussion and findings under Allegations 1 and 3.

Under the heading of Allegation 1, the Report states at page 27:

"Minister Mitchelmore has consistently maintained in the media, the House of Assembly, and in an interview with us, that Ms. Foote was the best qualified for the position and that her move was a lateral transfer consistent with similar transfers at the executive level within the public service;" and

"Dean Brinton and the Executive Committee of the Board perceived Minister Mitchelmore's direction to hire Ms. Foote as a direct order. Dean Brinton signed Ms. Foote's contract and both he and the Minister had signed a Request for Staffing Action Form. That Form was not in compliance with explicit Human Resource Secretariat instructions, in that the section dedicated to outlining the rationale for staffing was not completed."

Further findings of fact include that the Request for Staffing Action (RSA) form was not compliant with policy, that there was no evidence of consideration of other candidates, no job description was provided and that the Executive Director position was exempt from the *Public Service Commission Act* ("the "PSC Act"), due to Carla Foote being compensated on the executive pay plan.

The Report notes on page 29, that:

"We find that there were serious deviations from standard policies and practices which include:

- a) The direction or condoning of the elevation of the marketing and development position to an executive position, literally on the same day that the Board of Directors, after considerable work and consultation with the Human Resource Secretariat, had determined it should be a director level;*
- b) The direction or condoning of the Board of Directors and the CEO to hire Ms. Foote in the absence of a job competition or the provision of a resume, let alone the conduct of a job competition.*
- c) The said direction to hire was in contrast to other transfers within the senior executive of government in that it was not supported by an Order-in-Council."*

In relation to the findings listed above, Ms. Foote was engaged at The Rooms by a contract of employment. The PSC Act does not apply to contractual employees per section 4(n), and no competition was required for that reason.

The Human Resource Secretariat Employment Contract Policy states:

Subject to the terms of this policy, the Minister and/or the permanent head may, on behalf of the Government, enter into a contract of employment with any person where any of the following circumstances exist:

- the person will be providing services in connection with a specific project or program which is of limited duration, and/or which is cost-shared with another jurisdiction; or
- a person is required to perform a service on a regular, full-time or part-time basis, which requires specialized qualifications, knowledge, and/or experience.

While the budget allocation for another position at The Rooms was used to fund the contractual employment of Ms. Foote, her engagement does not result in a reclassification or filling of the existing position. The fact that Ms. Foote's compensation from her previous position as a departmental executive was maintained did not warrant or result in a reclassification of the existing Director of Marketing and Development position and they remain distinct positions.

Contracts of employment do not always include a position description. Sometimes a scope of work may be appended to the contract of employment. In other cases, there may be a brief summary of the role contained in an article of the contract or it may be through verbal discussions with the employee. In the case of Ms. Foote, there was no position description appended to or included in the contract. A description of the key responsibilities was provided verbally to Ms. Foote.

No new position description was prepared as this was not a reclassification. Ms. Foote was engaged at The Rooms as it was determined that her knowledge and experience with government would be an asset for The Rooms.

Executive positions are filled by Orders in Council which are required when legislation authorizes the Lieutenant-Governor in Council to appoint an individual to a position. The terms and conditions of employment for these positions are found in the Treasury Board approved Executive Compensation Policies that apply to positions filled by Order in Council. An Order in Council is not required for the creation of a contractual position. Positions compensated under the executive pay plan and contractual positions are exempt from the PSC Act. The contractual positions created at The Rooms in 2018 were titled "Executive Directors" to be consistent with other contractual positions within government and Crown agencies and the title does not determine whether it is an executive position within the government structure. There are a number of instances where consistent arrangements exist within the public service such as the Executive Director of Commercial Registry with Service Newfoundland and Labrador, Executive Director of Financial and Corporate Services at the Newfoundland and Labrador Housing Corporation and Executive Director of Support Services at the Royal Newfoundland Constabulary. These positions are not executive positions.

It is usual practice for government to move members of executive from one position to another as the need arises. In accordance with the Executive Compensation Policies and Procedures and to minimize the impact on individuals who are moved, salary and benefits are not changed. Otherwise, individuals may not agree to change positions and/or government could face legal claims such as constructive dismissal. Similarly, executive who are asked to move from their executive role to a contractual position, retain their executive salary and benefits for the term of the contract. The ability of the Clerk of the Executive Council to move executive in this way is critical to the effective management of the public service.

For reasons outlined above, the terms of Ms. Foote's contract with The Rooms preserved her existing salary of \$132,187.00, that had been set in accordance with the Executive Compensation Policies of government. In that respect, her move may be considered lateral. However, as noted above, the Executive Director position is not equivalent to an executive position in government so is not considered a lateral move within the government structure.

The Rooms Corporation has been provided with human resource support and services from the Human Resource Secretariat since it was incorporated. It is scheduled to the PSC Act, which means the Act applies to it, subject to specific exceptions listed in section 4. The departments of government are also listed in the schedule. The human resource processes for government have evolved over the years so that the Public Service Commission and the Human Resource Secretariat each fulfill functions in the staffing process. The departments and The Rooms are considered clients of the Human Resource Secretariat.

Generally, staffing action is initiated by a manager in a department. The Human Resource Secretariat is engaged through the Request for Staffing Action form (RSA), which identifies pertinent information such as the position being filled, Department and whether a competition will be held, whether it is contractual or a new or existing position. This information assists the Human Resource Secretariat with position tracking and management across clients and initiates the payroll function as well. The RSA form also includes a section where the rationale for hiring can be noted. It is not always completed. The purpose of this section on the RSA is to ensure that the signing authorities in the Department are aware of the reason for the request. This is a client matter and there is no requirement for this to be completed unless the signing authorities are not otherwise satisfied that they have the information they need to determine whether the RSA should be approved. It was an oversight of staff at Cabinet Secretariat that the rationale on the RSA for Ms. Foote was not complete. However, those with signing authority, including the Minister, were aware that Ms. Foote was being engaged at The Rooms and the rationale for same.

Under the heading of Allegation 3, the Report states at page 32 that:

"Here, Minister Mitchelmore either directly authorized the salary level for Ms. Foote through his signature on the Request for Staffing Action form, and/or he acquiesced in her receiving that level of pay. Having done so, we find that Minister Mitchelmore grossly violated his obligations as contained in section 8 of the Code of Conduct."

Clarification regarding the salary for Ms. Foote remaining at \$132,187.00, has been provided above. Also noted above, is the fact that the position of Director of Marketing and

Development was not reclassified or filled by Ms. Foote. The Minister did not provide authorization to fill the permanent position of Director of Marketing and Development. This position remains vacant and the salary funding for the vacancy is being used to fund the contractual position of Executive Director of Marketing and Development.

Similarly, four weeks later, the Minister approved the creation of the contractual position of Executive Director of Museums and Galleries. This contractual position is funded through the permanent position of Director, Provincial Museum, which is being held vacant. Anne Chafe who received a promotional increase and retained director level benefits most recently occupied this contractual position.

The Board of Directors may have thought they were approving the creation of executive roles however; the Board does not have the authority to create executive positions as these positions are created by statute or by the Lieutenant-Governor in Council and confirmed by an Order in Council. There is no Order in Council required for the creation or appointment to a contractual position.

Conclusion

The compensation for Ms. Foote was maintained to minimize the impact on her terms of employment resulting from her engagement at The Rooms. This is consistent with the approach taken by government when moving executive from one position to another and is in accordance with legal advice. While the Minister is accountable for spending in his area of responsibility, the rationale provided for maintaining Ms. Foote's salary and benefits is in accordance with policy and practice of government and is intended to mitigate potential legal claims. The Minister relies on these policies and practices and advice of officials to confirm that actions are in accordance with the details of the applicable policies and practices.

A competition or position description was not required in order to engage Ms. Foote on a contract. Engagement of contractual employees is within the policies approved by Treasury Board and is exempt from the PSC Act.

The budget allocations for the vacant permanent director positions at The Rooms are currently being used to fund the two referenced contractual positions. This is a common practice in the public service when trying to meet the operational needs of departments. It does not amount to an elimination or reclassification of the director positions. In addition, the classification of the director position was not impacted by the contractual position and the fact that the CEO of The Rooms made a substantially similar request to facilitate the engagement of Anne Chafe in a contractual position is indicative that operational needs can be met in a variety of ways and still be in accordance with policy.

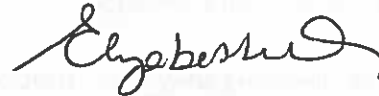
In my opinion, the information provided above demonstrates that the Minister did not support any actions that deviate from government policies and practices.

Your correspondence of June 27, 2019, notes that legal counsel for Minister Mitchelmore wrote your office and expressed concern that pertinent evidence may not have been provided to the investigation by officials with knowledge of the process followed in the engagement of Carla Foote at The Rooms Corporation ("The Rooms"). As the Minister is the only party to your

investigation, any submissions or concerns regarding procedural fairness will need to be addressed through his legal counsel.

To the extent that your investigation was premised on facts or analysis that have now been informed or clarified, I respectfully request that you reconsider your findings and conclusions as a result of this submission and that you consider preparing an amended or supplementary report.

Sincerely,



ELIZABETH DAY

cc: Honourable Perry Trimper
Speaker of the House of Assembly

Sandra Barnes
Clerk of the House of Assembly

Mr. Chris Peddigrew
Counsel for the Honourable Christopher Mitchelmore

APPENDIX SR-4

**Submission from the Solicitor for
Minister Mitchelmore to the
Citizens' Representative, dated April 17, 2019**



July 19, 2019

Office of the Citizen's Representative
Province of Newfoundland and Labrador
20 Crosbie Place
PO Box 8400
4th Floor, Beothuk Bldg.
St. John's, NL A1B 3N7

Attention: Bradley Moss (via email: bradleymoss@gov.nl.ca)

Dear Mr. Moss:

**Re: Our Client – The Honourable Christopher Mitchelmore, Minister of the Department of
Tourism, Culture, Industry and Innovation
Your file number – 3WB19**

We write in follow up to our letter of July 16, 2019 regarding the above-noted matter. As referenced in our July 16, 2019 letter, on July 12, 2019 we received a copy of the letter sent to you by the Clerk of the Executive Council (the "Clerk's Letter") and have now had an opportunity to review the Clerk's Letter. Given the information and clarification contained in the Clerk's Letter, we feel it is necessary to offer comments on behalf of our client.

As you are aware, we wrote the Speaker of the House of Assembly on June 19, 2019 identifying what we perceived to be a lack of procedural fairness in relation to your office's failure to interview the Clerk of the Executive Council or individual(s) within Human Resources Secretariat prior to issuing your office's June 11, 2019 Report (the "OCR Report").

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On June 27, 2019 you wrote the Speaker of the House of Assembly and provided comments regarding our concerns about a lack of procedural fairness. Having reviewed your comments, we feel it is necessary to clarify what seems to be a misunderstanding on your part regarding how and why we have concerns with respect to procedural fairness.

In reply to certain comments in your June 27, 2019 letter explaining the efforts made by the OCR during its investigation, we wish to clarify it is not being alleged that the OCR did not give the Minister an opportunity to make submissions, that particulars of the allegations were not provided to the Minister, or that documents requested from your office were not provided. A lack of procedural fairness can arise in a variety of ways and need not be deliberate or designed to deprive. We are not suggesting the OCR deliberately set out to deny procedural fairness to the Minister, but we do take the position the OCR should have, of its own initiative, interviewed individuals from Cabinet Secretariat and/or Human Resources Secretariat in relation to hiring practices and practices pertaining to employment contracts within Government, including at the Rooms.

In reply to your comment that the OCR did not receive a substantive response from the Minister even though there was an opportunity to do so, we wish to clarify that we provided a written response to the allegations following the Minister's interview on April 9, 2019 by letter dated April 17, 2019. We felt it was appropriate to wait until after the Minister's interview before submitting this letter.

2

In reviewing your June 27, 2019 letter there seems to be a suggestion the Minister should have been more proactive with respect to obtaining information from Cabinet Secretariat and/or Human Resources Secretariat as part of the OCR's investigation. Reference is made in your June 27, 2019 letter to the Minister's duty at law to disclose documents and evidence as part of the investigation. While we acknowledge the Minister could have suggested individuals during the investigation for you to interview who might have possessed pertinent information regarding the subject matter of the allegations, we do not feel it is the Minister's responsibility to determine who should be interviewed during an investigation. The Minister is aware of his obligation to cooperate under the *House of Assembly Accountability, Integrity and Administration Act (the "Act")* and we respectfully submit that he met his obligations in this regard. Perhaps mistakenly, but not unreasonably, Minister Mitchelmore assumed individuals within Cabinet Secretariat and Human Resources Secretariat would have been identified by the OCR and interviewed as part of the investigation. In our view, it is the responsibility of the OCR under Part VI of the Act to direct its own investigation, identify issues to probe, and identify appropriate individuals for interviewing as part of its investigation.

Another factor for consideration in the context of whether the Minister could have or should have done more to direct the OCR to Cabinet Secretariat and/or Human Resources Secretariat during the investigation is the fact that the Public Interest Disclosure processes under Part VI of

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the Act are comparable to and have similarities with whistle-blower legislation insofar as, among other things, Part VI contains language protecting the identity of persons making disclosures, contains language to protect against reprisals, and contains language to prevent the obstruction of an investigation. Within this context, the Minister was mindful of avoiding a suggestion he was attempting to influence the investigation or causing it to lose impartiality or independence. Part VI of the Act is relatively new (being incorporated into the Act in 2007) and has not been frequently invoked or received extensive interpretation. The investigation processes thereunder are not as well established as other administrative investigative processes that arise more frequently and have a longer history within Government. Indeed, Public Interest Disclosure investigations under Part VI of the Act are relatively new ground for not only the Minister, but also the OCR.

Regarding the hiring processes within Government, while Minister Mitchelmore is informed on the policies and processes for hiring in his area of responsibility, the information and clarification in the Clerk's Letter provides the broader context of policies and practices with respect to executive staffing across Government and Crown agencies. As clarified in the Clerk's Letter:

From a practical perspective, officials [such as Cabinet Secretariat and Human Resources Secretariat] are relied on for operational knowledge and to confirm that proposed actions are in accordance with the details of the applicable policies and practices. As a result, several conclusions are made in the Report without the benefit of the broader context that can be provided by Cabinet Secretariat...

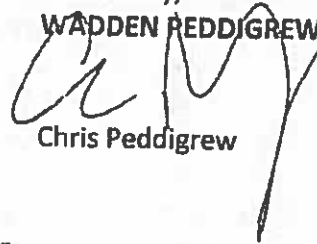
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Regardless of whether the Minister should have explicitly suggested that the OCR interview someone from Cabinet Secretariat or Human Resources Secretariat or whether the OCR should have, of its own initiative, interviewed such individual(s) prior to reaching findings and conclusions and issuing its June 11, 2019 OCR Report, relevant information is now known by the OCR that was not known beforehand. We respectfully submit it is incumbent on the OCR, considering the requirements of procedural fairness and natural justice, to take this information and clarification in the Clerk's Letter into account, conduct any follow up inquiries or investigation it feels is warranted, and consider how such information impacts the conclusions and findings in the OCR's June 11, 2019 Report. Failure to do so, in our view, would result in the exclusion of relevant and crucial evidence and a corresponding breach of procedural fairness and natural justice.

Considering the information and clarification provided in the Clerk's Letter, in our view it is clear that Minister Mitchelmore did not support any actions that deviate from Government policies or practices and that Minister Mitchelmore did not grossly mismanage or grossly violate his obligations with respect to the Code of Conduct.

We respectfully request on behalf of Minister Mitchelmore that the OCR reconsider its findings and conclusions in relation to allegations 1 and 3 in the June 11, 2019 OCR Report and issue an amended or supplementary report. Part VI of the Act does not preclude the OCR from considering additional information and clarification or from reopening an investigation when relevant and crucial information comes to light, nor does Part VI of the Act preclude the OCR from issuing an amended or supplementary report. We respectfully submit that principles of procedural fairness and natural justice require the OCR to take such actions.

Yours truly,
WADDEN PEDDIGREW HOGAN



Chris Peddigrew

cc.

Honourable Perry Trimper
Speaker of the House of Assembly

Sandra Barnes
Clerk of the House of Assembly

Elizabeth Day
Clerk of the Executive Council

4



APPENDIX C:

**Citizen's Representative Report
Corrigendum, July 30, 2019**



Office of the Citizens' Representative
House of Assembly

Corrigendum to Report

This is a Corrigendum to the Report of the Citizens' Representative released on July 29, 2019 and it is hereby amended as follows.

[1] On page iii (ref: Appendix SR-4) replace "dated April 17, 2019" with "dated July 19, 2019."

[2] On page 2, paragraph 6, replace "is hired from October 1, 2019" with "is hired from October 1, 2018."

[3] Appendix SR-4 cover page replace "April 17, 2019" with "July 19, 2019."

DATED AT St. John's, in the Province of Newfoundland and Labrador this 30th Day of July, 2019.

Bradley J. Moss

Citizens' Representative



APPENDIX D:

**Response from Minister Mitchelmore,
August 28, 2019**

August 28, 2019

Via Email: brucechaulk@gov.nl.ca

Bruce Chaulk, MBA, CPA, CMA
Commissioner for Legislative Standards
Office of the Commissioner for Legislative Standards
39 Hallett Crescent
St. John's, NL A1B 4C4
Attention: Bruce Chaulk, Commissioner for Legislative Standards

Dear Mr. Chaulk:

**Re: The Honourable Christopher Mitchelmore
OCR File Number: 3WB19**

We write further to the report of the Office of the Citizen's Representative ("OCR") dated June 11, 2019 (the "Initial Report") and the OCR's Supplemental Report dated July 29, 2019 (the "Supplemental Report") (collectively referred to herein as the "OCR Reports"), arising from a disclosure under the *House of Assembly, Accountability and Integrity Act* (the "Act").

As you are aware, in its Initial Report the OCR made the following findings with respect to Allegation #1:

We conclude that Minister Mitchelmore's actions in intervening to facilitate the hire of Ms. Foote at the Rooms not only breached the Code of Conduct, but grossly mismanaged his obligations under that Code. Specifically, we find that Minister Mitchelmore fundamentally mismanaged his obligations pursuant to the following provisions:

- The fundamental objective of holding public office is to serve his fellow citizens with integrity in order to improve the economic and social conditions of the people of the Province. (2)

- That he act lawfully and in a manner that will withstand close public scrutiny. (4)
- That he base his conduct on the consideration of the public interest. (7)
- That his relationship with government employees should be professional and based up on mutual respect and should have regard to the duty of those employees to remain politically impartial when carrying out their duties. (10)

As you are aware, in its Initial Report the OCR made the following findings with respect to Allegation #3:

Reasonable people would expect the Minister of the Crown to exact strict scrutiny to a request for additional salary expenditures. Indeed that is nearly universally the case. Here, Minister Mitchelmore either directly authorized the salary level for Ms. Foote through his signature on the Request for Staffing Action Form, and/or he acquiesced in her receiving that level of pay. Having done so, we find that Minister Mitchelmore grossly violated his obligations as contained in Section 8 of the Code of Conduct.

Then the OCR concluded:

Minister Mitchelmore grossly mismanaged his obligations with respect to the Code of Conduct given his involvement in the appointment of Carla Foote to The Rooms and the setting, or permitting to be set, her salary at \$132,000.

We would like to make clear that there was no evidence to suggest that Minister Mitchelmore, in any way, received monetary or other benefit with respect to the matters discussed in this report. Indeed, as evidenced by the media attention which the issue attracted, his reputation may have been harmed.

These conclusions were frankly quite surprising to Minister Mitchelmore.

The OCR's Initial Report was provided to the Speaker of the House of Assembly and the Clerk of the House of Assembly pursuant to section 58(7) of the Act. On the first page of your June 18, 2019 letter to Minister Mitchelmore, you indicate the Speaker then provided the Initial Report to you in accordance with section 58(7) of the Act (we assume you meant section 58(10)(a) of the Act). On the second page of your June 18, 2019 letter, you indicate that the Initial Report was referred to you by the Speaker "pursuant to section 58(10) to take appropriate action in light of the recommendation of corrective action". You go on to state:

Therefore, it is my duty to recommend corrective action based upon the findings of the breach of principles 2, 4, 7, 8, and 10 of the Code of Conduct. In recommending corrective action it is not my role to revisit or overturn the findings of the Citizens' Representative.

The OCR's findings with respect to Allegation #1 and Allegation #3 are legal conclusions, not factual conclusions. We respectfully submit you are not automatically required to accept the OCR's legal conclusions, nor are you required to accept the OCR's recommendation for "corrective action". In fact, we respectfully submit that your statutory obligation requires you not to simply accept the legal conclusions and recommendations of the OCR. The language of section 58(10)(a) of the Act requires you to take "appropriate action". Had the legislature intended that you were required to automatically accept the OCR's findings and recommendations and automatically take "corrective action", then section 58(10) of the Act would say so, but it clearly requires you to take "appropriate action". We submit this language requires you, at a minimum, to do the following:

- 1) Review and consider the OCR's Reports as one part of your determination of what is "appropriate action" in the circumstances;
- 2) In doing so, review and consider whatever documents you consider relevant to your determination of what is "appropriate action" in the circumstances;
- 3) Review and assess the OCR's conclusions under Allegation #1 and Allegation #3, which are legal in nature, that Minister Mitchelmore breached the Code of Conduct and/or committed gross mismanagement;
- 4) Perform your own assessment of whether Minister Mitchelmore breached the Code of Conduct and/or committed gross mismanagement;
- 5) Perform your own assessment of whether corrective action is an "appropriate action" or not;
- 6) If you determine that "corrective action" is "appropriate action" in the circumstances, and we firmly take the position it is not, then you would need to assess what corrective action is appropriate.

Role of the OCR versus Role of the Commissioner of Legislative Standards

We acknowledge the role of the OCR in Part VI of the Act is to investigate a public disclosure and issue a report of its findings and recommendations. We respectfully submit the OCR made findings and recommendations and reached legal conclusions that are not supported by the evidence and information presented to it, particularly in light of the July 12, 2019 submission to the OCR from the Clerk of the Executive Council providing clarification and relevant information deemed necessary after a review of the OCR's Initial Report.

Given what is at stake, the OCR's findings, recommendations and legal conclusions cannot be automatically accepted by you without full analysis and consideration. First, as will be explained throughout this letter, from a Government-wide perspective the OCR's findings, recommendations and legal conclusions will have significant negative consequences for the efficient and effective management and operation of human resources within the public service. In her July 12, 2019 letter, the Clerk of the Executive Council explained unequivocally that the ability to move executives in the manner Carla Foote was moved is critical to the effective management of the public service. Long-standing human resources practices within

Government have been established over a number of years based on legal advice, legal risk exposure, and the practical reality there is frequent turnover and consequential movement of Government employees both within and between core Government and Government's boards, agencies and commissions. The OCR's findings, recommendations and legal conclusions fail to give appropriate deference to this reality.

Second, from the perspective of the personal and professional reputation of Minister Mitchelmore, the OCR's finding that Minister Mitchelmore grossly mismanaged his obligations with respect to the Code of Conduct has serious negative implications for the Minister. In our view, the OCR's legal conclusions in this regard are not reasonable and are not supported by the facts. Given the mandate of your office, we submit it is incumbent on you not to blindly accept the OCR's findings, recommendations and legal conclusions.

Our position that you are not required to blindly accept the findings, recommendations and conclusions of the OCR is supported by the language chosen by the legislature for inclusion in section 58(10) of the Act as explained above, and is further supported by the following:

- 1) In the OCR's Supplemental Report (page 1, second paragraph) it states: "...We also conveyed our opinion that the Commissioner of Legislative Standards should review the report as he has the express legal jurisdiction to consider alleged Code violations under subsection 36(1) of the...Act, as well as the conventional skills and experience to further adjudicate this matter under the lens of the Code."
- 2) In the second last paragraph of the OCR's Supplemental Report (page 5), the OCR reiterates its "call for a review by the Commissioner of Legislative Standards for scrutiny of these issues for potential code violations". [emphasis]
- 3) In fulfillment of his responsibilities under section 58(10)(a) of the Act, upon receipt of the OCR's Initial Report, the Speaker of the House of Assembly referred the Initial Report to the "appropriate official to take appropriate action", which the Speaker determined to be not only you as the Commissioner for Legislative Standards, but also the Clerk of the Executive Council because the OCR's Initial Report concerns hiring practices in the civil service. Had you been expected to simply accept the findings, recommendations and legal conclusions of the OCR, we submit the Speaker would not have determined it necessary pursuant to section 58(10)(a) of the Act to send the Initial Report to the Clerk of the Executive Council (we refer you to paragraph 3 of a June 19, 2019 letter to me from Kim Hawley George, Law Clerk for the House of Assembly, on behalf of the Speaker, a copy of which is enclosed). Fortunately, however, the Speaker did identify the Clerk of the Executive Council as an "appropriate official to take appropriate action" because after reviewing the OCR's Initial Report, the Clerk of the Executive identified it was necessary to write to the OCR to clarify erroneous conclusions in its Initial Report. This letter from the Clerk of the Executive Council is discussed below.

July 12, 2019 Letter from the Clerk of the Executive Council to the OCR

As you may be aware, after reviewing the OCR's Initial Report, the Clerk of the Executive Council determined it was necessary to write the OCR on July 12, 2019 to express her concern that "erroneous conclusions were relied on to support a finding of gross mismanagement on the part of the Minister".

The current Clerk of the Executive Council, Elizabeth Day, is a 31-year civil servant occupying the most senior civil service position in Government. Her clarifications and submissions should not be dismissed absent clear and cogent reasons to reject them. Yet, as we explain throughout this letter, in its Supplemental Report, the OCR essentially rejected or ignored, without valid reasons, the clarifications and submissions presented to it by the Clerk of the Executive Council. By failing to accept the valid clarifications and submissions of the Clerk of the Executive Council, the OCR committed fundamental errors necessitating a thorough review by you before taking action.

We enclose a copy of the Clerk of the Executive Council's July 12, 2019 letter to the OCR for your reference. In her letter to the OCR, the Clerk of the Executive Council concluded:

To the extent that your investigation was premised on facts or analysis that have now been informed or clarified, I respectfully request that you reconsider your findings and conclusions as a result of this submission and that you consider preparing an amended or supplementary report.

In its Supplemental Report, the OCR states the Clerk of the Executive Council made a request for reconsideration because she felt the OCR's findings "might not" have been premised on facts and analysis contained in the Clerk of the Executive Council's submission. This is a softening of the statement of concern expressed by the Clerk of the Executive Council who unequivocally told the OCR that erroneous conclusions were relied on to support a finding of gross mismanagement. While the OCR received and presumably considered the letter from the Clerk of the Executive Council, it did not alter its findings or recommendations in its Supplemental Report, stating:

We wish to acknowledge and thank the Executive Council for its work in preparing the submission document but its content does not provide a solid basis on which we can alter our findings and recommendations. We come to this conclusion after considering the following issues that arise from Executive Council's commentary.

The crux of this letter to you is that the letter from the Clerk of the Executive Council not only provided the "solid basis" for the OCR to alter its findings and recommendations, but that by not altering its findings and recommendations, the OCR committed an error which cannot be allowed to stand. Below we provide commentary in response to each heading contained in the OCR's Supplemental Report in reply to the issues arising from the Clerk of the Executive Council's submission.

Heading: a) Re: The Public Service Commission Act (the “PSC Act”)

We agree with the OCR that positions compensated under the Executive Pay Plan and persons hired as contractual employees are two examples of exemptions from the Public Service Commission Act (the “PSC Act”). We disagree, however, with the following statements in the OCR’s Supplemental Report:

Therefore, in our view, Ms. Foote is not a “contractual employee” as anticipated by Section 2(f) of the PSC Act. We respectfully disagree with the statement in the Executive Council submission which states, “the PSC Act does not apply to contractual employees per section 4(n) and no competition was required for that reason”.

It is the clear and unequivocal submission of the Clerk of the Executive Council that the PSC Act does not apply to contractual employees. While we do not think the OCR is saying otherwise, the matter in any event is not open for debate as per the clear language of section 2(f) and 4(n) of the PSC Act. In addition, however, the Clerk of the Executive Council clearly and unequivocally submitted that Carla Foote was hired to The Rooms as a contractual employee and therefore the PSC Act did not apply to her hiring. The OCR outright rejected this submission, applying its own legal analysis in order to reach a conclusion that Ms. Foote is not a contractual employee, reasoning that:

During our investigation we obtained a copy of Ms. Foote’s contract with The Rooms. Unlike (then) CEO’s contract for a term of five years, Ms. Foote’s contract is unquestionably open ended, and for unknown reasons is described as “renewable”. In any event, there is no specific term in force. In Section 1.3, Ms. Foote is hired from October 1, 2019 [*sic.* 2018] until terminated, pursuant to the terms of the agreement. This is not a designated length of time one would attribute to the definition of a “term” in its grammatical, legal or ordinary sense. Rather, the open-ended nature of the contract is akin to what one might find in a contract for a full-time employee.

Therefore, in our view, Ms. Foote is not a “contractual employee”.

With respect, the OCR’s analysis and conclusions are deficient in several respects. First, the OCR openly questioned the reason for inclusion of the term “renewable” in Ms. Foote’s contract, yet did nothing to inquire about its inclusion, investigate its meaning, or find out why it is part of Ms. Foote’s contract. The grammatical, legal and ordinary use of the word “renewable” means to renew or repeat something, which implicitly means that the thing in question will come to an end. Rather than inquire or investigate the reason for the inclusion of “renewable” in Ms. Foote’s contract, the OCR focused solely on the word “term” and relied on its own interpretation of that word, which it concluded can only mean the contract must contain a designated length of time, which it further concluded must mean Ms. Foote is not a contractual employee because her contract does not contain a specified termination date. In applying the

reasoning it did, the OCR read language and requirements into the definition of “contractual employee” that are not there.

2.(f) "contractual employee" means a person employed for a certain term for the purpose of performing certain specified work and whose terms and conditions of employment are specifically stated in a written contract;

The OCR’s analysis is an oversimplification of the issue and closed off to another equally plausible interpretation that is consistent with the evidence – that being that Ms. Foote is a contractual employee. In rejecting the submission of the Clerk of the Executive Council that Ms. Foote is a contractual employee, the OCR ignored or rejected the evidence in the Request for Staffing Action form for Ms. Foote, which indicated that the funding for the position was “*temporary*”, that the payroll action type was “*hire – contractual employment*”, and that the “*status of the temporary incumbent*” was “*contractual employment*”, all of which would have been completed by Human Resources Secretariat or Executive Council prior to being given to Minister Mitchelmore for signing.

Even if one were to accept the legal argument of the OCR that Ms. Foote is not a contractual employee, which we do not accept, the salient point, which appears to have been missed by the OCR, is that Minister Mitchelmore was operating on the understanding that Ms. Foote was to be a contractual employee. The importance of this fact cannot be overemphasized. All findings and conclusions of the OCR flow from its opinion that Ms. Foote is not a contractual employee.

The RSA form was presented to Minister Mitchelmore and he understood that Ms. Foote’s appointment and status at The Rooms would be temporary and contractual and could be terminated. Based on this understanding, Minister Mitchelmore was of the belief that the contract with Ms. Foote was in accordance with Government’s Employment Contract Policy (a copy of which is enclosed for your reference), which allows a Minister to enter into a contract of employment. This understanding on the part of the Minister is highly relevant and it refutes the OCR’s conclusion that the Minister committed gross mismanagement. It is not the Minister’s role nor is it his responsibility to engage in legal analysis to determine whether the contract for Ms. Foote resulted in her being a contractual employee or not. Minister Mitchelmore understood she was to be a contractual employee and understood that the appropriate Government personnel would draft an employment contract to that effect. If the OCR’s opinion is that the contract that was drafted for the Minister’s signature does not result in Ms. Foote being a contractual employee, such an opinion cannot be the basis for the OCR to reach the conclusions it did.

Moreover, Ms. Foote’s contract can be terminated at any time by Government if funding for the position is not approved in subsequent budgets, subject to providing reasonable notice/pay in lieu of reasonable notice, which it would have had to provide to her in October 2018 had it not identified a new position for her. This issue of Government’s options in late September 2018/early October 2018 are discussed in the following two sections of this letter.

Heading: b) Re: Budget Allocation

The OCR concludes that because the Director of Marketing Position in The Rooms organization chart had a starting salary in 2018 of \$85,000 and because Ms. Foote's salary is \$132,187 and because the OCR's opinion is that neither the Minister nor Executive Council provided it with "a firm explanation" as to where the \$47,000+ salary differential for Ms. Foote's salary comes from, barring any new evidence, it can only be concluded the \$47,000+ has to come from the general operational budget for The Rooms. The OCR then goes on to state that "this differential represents public funds which could have been used for other purposes to assist The Rooms in fulfilling its mandate or alternatively, returned to the public treasury". In this regard, the OCR concludes that Minister Mitchelmore committed gross mismanagement of public funds.

The OCR's reasoning is problematic on multiple levels. The key point missing from the OCR's conclusion is that Carla Foote was already an employee of Government. Had Ms. Foote been a new hire off the street and placed into the position at a salary of \$132,000, the OCR's reasoning might make sense. The Clerk of the Executive Council stated in the first paragraph on page 4 of her July 12, 2019 letter:

It is usual practice for government to move members of executive from one position to another as the need arises. In accordance with the Executive Compensation Policies and Procedures and to minimize the impact on individuals who are moved, salary and benefits are not changed. Otherwise, individuals may not agree to change positions and/or government could face legal claims such as constructive dismissal. Similarly, executive who are asked to move from their executive role to a contractual position, retain their salary and benefits for the term of the contract. The ability of the Clerk of the Executive Council to move executive in this way is critical to the effective management of the public service. [emphasis]

Despite this reasonable and logical clarification provided by the Clerk of the Executive Council, the OCR rejected it and decided that Minister Mitchelmore's actions cost the public purse in excess of \$47,000. While the Clerk of the Executive Council's clarification sufficiently refutes the OCR's determination, it is nevertheless worthwhile to elaborate on the point the Clerk of the Executive Council was making. A decision had been made to move Carla Foote from her former position as Associate Secretary of Cabinet (Communications) with Executive Council in late September 2018. As a result, Government had to either find Ms. Foote a new position within core Government or with an agency, board or commission of Government and maintain her level of compensation to reduce the risk of a constructive dismissal claim, or terminate her employment with Government and provide reasonable pay in lieu of notice, severance, etc. Government chose the first option. We respectfully submit it is Government's prerogative to do so. Government makes such decisions based on a number of factors, including legal advice and it is not the OCR's role to second guess this type of decision.

It is common for executives to be moved within Government for the reasons expressed by the Clerk of the Executive Council. The Clerk of the Executive Council also clarified any confusion that may have been created by calling Ms. Foote and Ms. Ann Chafe “executive directors”. New Executive Director positions were not created at The Rooms, but rather contractual positions were approved for Ms. Foote and then a few months later for Ms. Chafe. Neither position is an “executive” position in the sense of being on the executive pay plan or requiring an Order in Council.

The OCR’s opinion that Minister Mitchelmore cost the public purse in excess of \$47,000 is factually incorrect and it is at odds with the clear explanation provided by the Clerk of the Executive Council. In expressing this opinion, the OCR exceeded the role it is to perform under the Act. The Rooms is funded by Government and in this regard, the funds for The Rooms are the funds of Government. As a result of moving Ms. Foote to another position, Government avoided the direct costs would have resulted from a termination of employment (i.e. reasonable pay in lieu of notice, severance etc.). Government also avoided potential indirect costs such as Department of Justice and Public Safety lawyers dealing with a potential claim by Ms. Foote.

Heading: c) Re: An Executive Position

This section of the OCR’s Supplemental Report similarly contains fundamental errors. First, the analysis and reasoning are likewise premised on the OCR’s “opinion” that Ms. Foote is not a “contractual employee”, which we have addressed above. Second, the OCR implicitly rejected the Clerk of the Executive Council’s statement that “the [two] contractual positions created at The Rooms in 2018 were titled ‘Executive Directors’ to be consistent with other contractual positions within government and Crown agencies, and the title does not determine whether it is an executive position within the government structure.” The OCR’s rejection of this clarification from the Clerk of the Executive Council seems to be premised on the OCR’s opinion that Ms. Foote’s contract is “strikingly similar” “in form and substance” “to others we have seen for government executives”. The OCR then refers to aspects of Ms. Foote’s contract that are similar to other executive contracts it has seen and seems to conclude that Ms. Foote has an executive contract.

The fact that Ms. Foote’s contract with The Rooms is “strikingly similar” to other executive contracts at Government is not surprising to Minister Mitchelmore, nor would it be surprising to the Clerk of the Executive Council. In fact, it would be surprising if Ms. Foote’s contract was not strikingly similar to an executive contract. Prior to commencing employment at The Rooms, Ms. Foote was in the executive-level position of Associate Secretary of Cabinet (Communications) with Executive Council. Based on legal input in previous similar human resources matters, it was understood failure to maintain Ms. Foote’s compensation in the new position would have created risk for a constructive dismissal claim. As explained by the Clerk of the Executive Council, it is common practice in Government to move executives in this manner. The OCR’s reliance on the fact Ms. Foote’s contract with The Rooms is “strikingly similar” to an executive contract to support its finding that Minister Mitchelmore is guilty of gross

mismanagement illustrates the OCR either missed, ignored, wrongly rejected, or misunderstood the following clarification provided by the Clerk of the Executive Council:

The compensation for Ms. Foote was maintained to minimize the impact on her terms of employment resulting from her engagement at The Rooms. This is consistent with the approach taken by government when moving executive from one position to another and is in accordance with legal advice. While the Minister is accountable for spending in his area of responsibility, the rationale provided for maintaining Ms. Foote's salary and benefits is in accordance with policy and practice of government and is intended to mitigate potential legal claims. The Minister relies on these policies and practices and advice of officials to confirm that actions are in accordance with the details of the applicable policies and practices.

The OCR's legal conclusion that Minister Mitchelmore committed gross mismanagement in relation to Ms. Foote's salary in the face of a clear and unequivocal clarification from the Clerk of the Executive Council cannot be allowed to stand.

Heading: d) Request for Staffing Action Form (RSA)

In this section of its Supplemental Report, the OCR states it is "somewhat perplexed" by the Clerk of the Executive Council's "proposition" that Request for Staffing Action (RSA) forms are not always required (we point out the Clerk of the Executive Council actually said that the "rationale for staffing" section is not always required, not that RSA forms are not required). The reasons the OCR indicates it is "somewhat perplexed" by the Clerk of the Executive Council's proposition are: RSA forms contain instructions stating that the form must be completed to authorize a staffing action; the section "Rationale for Staffing" notes that the section must be completed for all RSAs; the RSA for the Executive Director of Museums and Galleries contained a "fully completed" Rationale for Staffing section (whereas the one for Carla Foote did not); and as an ombudsman office, the OCR is "generally wary of deviations from explicit policy direction".

While we understand the premise of OCR seeking clarification with respect to a deviation from a written policy direction, we do not understand why the OCR would need to be "wary". In any event, any wariness on the part of the OCR should have been alleviated by the unequivocal statement put forward by the Clerk of the Executive Council that the "rationale for hiring" section in RSA forms "is not always completed". We respectfully submit the OCR had no valid reason to reject this clarification and it is problematic that it did so. The Clerk of the Executive Council is significantly more knowledgeable and experienced than the OCR with respect to the hiring policies and practices within Government and her submission should have been accepted unless there was a valid reason to question its truthfulness, which we submit there was not. The clarification of the Clerk of the Executive Council was that:

Generally, staffing action is initiated by a manager in a department. The Human Resource Secretariat is engaged through the Request for Staffing Action form (RSA),

which identifies pertinent information such as the position being filled, Department and whether a competition will be held, whether it is contractual or a new and existing position. This information assists the Human Resource Secretariat with position tracking and management across clients and initiates the payroll function as well. The RSA form also includes a section where the rationale for hiring can be noted. It is not always completed. The purpose of this section on the RSA is to ensure that the signing authorities in the Department are aware of the reason for the request. This is a client matter and there is no requirement for this to be completed unless the signing authorities are not otherwise satisfied that they have the information they need to determine whether the RSA should be approved. It was an oversight of staff at Cabinet Secretariat that the rationale on the RSA for Ms. Foote was not complete. However, those with signing authority including the Minister, were aware that Ms. Foote was being engaged at The Rooms and the rationale for same. [emphasis]

The Clerk of the Executive Council described a practice that while not in strict compliance with the written instructions for completing RSAs, is nevertheless in compliance with an established and accepted practice within Government. The OCR's rejection of this clarification by the Clerk of the Executive Council ignores the reality that in Government, like in many workplaces, there can be written requirements that evolve and become modified and/or abbreviated through practice without the written policy being formally updated. There is nothing unreasonable about this submission from the Clerk of the Executive Council and no reason for the OCR to have rejected it. If the Clerk of the Executive Council's explanation was not true, then the RSA for Ms. Foote would presumably have been flagged at some point by Human Resources Secretariat or Executive Council. It was not. The Clerk of the Executive Council confirmed "It was an oversight of staff at Cabinet Secretariat that the rationale on the RSA for Ms. Foote was not complete", which oversight is explained by the Clerk of the Executive Council's clarification that there is no requirement for the rationale for staffing section to be completed unless the signing authorities (i.e. the Minister) are not otherwise satisfied that they have the information they need to determine whether the RSA should be approved. In this case, the Clerk of the Executive Council explained that those with signing authority, including the Minister, were aware that Ms. Foote was being engaged at The Rooms and the rationale for same. It is noteworthy that on page 3 of the OCR's Initial Report, it summarizes evidence from Dean Brinton that "...any signature required by the Minister on a Request for Staffing Action Form signified financial approval for the hire, as opposed to an assessment by the Minister of the merit of the hire from a human resources perspective."

"Gross Mismanagement"

While the term "Gross Mismanagement" in section 54(1)(e) of the Act is not defined, on page 26 of its Initial Report the OCR refers to the factors identified by the Public Sector Integrity Commissioner of Canada when determining whether a situation could constitute "Gross Mismanagement". The first factor is "*The seriousness of the deviation from the standards, policies or practices*". The Clerk of the Executive Council was clear that in her opinion, which is based on her 31 years of experience in the public sector and her regular dealings with these

matters, Minister Mitchelmore “did not support any actions that deviate from government policies and practices”. We submit such a clear and unequivocal statement from the Clerk of the Executive Council should have ended the matter, but it did not. We therefore point to the explanations provided herein to underscore that the statement of the Clerk of the Executive Council was correct in concluding that Minister Mitchelmore did not deviate from standards, policies or practices.

The remaining factors considered by the Public Sector Integrity Commissioner of Canada as referred to by the OCR in its Initial Report only apply if there is some finding of a deviation from standards, policies or practices, which we submit there was not. And even if there was a deviation from standards, policies or practices, such deviation falls far short of gross mismanagement according to the factors identified by the Public Sector Integrity Commissioner of Canada.

On June 15, 2018, the OCR released its April 1, 2017 – March 31, 2018 Report on Activities Pursuant to the Public Interest Disclosure and Whistleblower Protection Act. On pages 3 and 4 of that report, the OCR states the following:

What is “Gross Mismanagement?”

PIDA does not specifically define gross mismanagement. The OCR takes a flexible approach when assessing potential disclosures under the lens of gross mismanagement. Generally, the Citizens’ Representative will ask if the allegation, as stated, are proven, would they engage any of the following:

- matters of significant importance;
- serious errors that are not debatable among reasonable people;
- something more than *de minimus*, or “one-off” wrongdoing or negligence;
- management action or inaction that creates a substantial risk of significant adverse impact upon the ability of an organization, office, or unit to carry out its mandate in the public interest;
- the deliberate nature of the wrongdoing; and
- the systemic nature of the wrongdoing.

The OCR did not mention or refer to these considerations in either its Initial Report or its Supplemental Report. Had the OCR considered these factors, we respectfully submit it would have had no choice but to conclude that Minister Mitchelmore did not commit gross mismanagement. Briefly, in response to each of those points:

- the movement of an employee from a job in core Government to a job in The Rooms is not the type of matter envisioned by the phrase “matters of significant importance”;
- the hiring of Carla Foote at The Rooms is “debatable among reasonable people” as is evident by the differing views of the OCR and the Clerk of the Executive Council. The

Clerk of the Executive Council is entirely satisfied it was carried out in accordance with the applicable legislation as well as established Government policies and practices, yet the OCR disagrees. The Clerk of the Executive Council and the former Citizens' Representative (Barry Fleming) and current Citizens' Representative (Brad Moss) are reasonable people, yet they fundamentally disagree;

- even if the hiring of Carla Foote was a wrongdoing or was a serious error and even if it was a decision of Minister Mitchelmore, it was consistent with standard hiring practices within the civil service;
- there is no “substantial risk of significant adverse impact upon the ability” of The Rooms, or Government for that matter, “to carry out its mandate in the public interest”. In fact, the OCR has already reached essentially the same conclusion in response to allegation #5 against Minister Mitchelmore (see page 32 of the OCR's Initial Report);
- “the deliberate nature of the wrongdoing” assumes that there was a wrongdoing, which we submit there was not for all the reasons set out herein; and
- “the systemic nature of the wrongdoing” again assumes there was a wrongdoing, which we submit there was not for all the reasons set out herein. Furthermore, even if there was a wrongdoing, there is no evidence of anything “systemic”.

There is very little precedent or case law providing direction or assistance with respect to the meaning of the phrase “gross mismanagement”. In fact, based on our research, this appears to be one of the only cases, if not the only case, in this Province, and there appear to be very few from across the country. That this case has become one of the very few cases to engage a gross mismanagement analysis seems disproportionate given the subject matter. In any event, the absence of precedent or case law is another reason for you to carefully scrutinize the OCR's findings, recommendations and most importantly its legal conclusions with respect to Allegation #1 and Allegation #3 since there is not a well-established body of case law telling us what is meant by the term “gross mismanagement”.

We were able to identify one report from the Office of the Public Sector Integrity Commissioner of Canada from May 2014 involving Enterprise Cape Breton Corporation that provides some assistance with respect to when a finding of “gross mismanagement” is appropriate and when it is disproportionate. In this case, the investigation found that the respondent (Mr. Lynn) committed a serious breach of ECBC's Employment Conduct and Discipline Policy, which was ECBC's own code of conduct at the time. This finding resulted from Mr. Lynn's appointment of four individuals with ties to the Progressive Conservative Party of Canada or the Progressive Conservative Party of Nova Scotia into executive positions at ECBC with little or no documented justifications and without demonstrating that the appointments were merit-based. Despite these findings, the Federal Integrity Commissioner did not find gross mismanagement on the part of Mr. Lynn.

The facts of the ECBC case are more extreme than the allegations against Minister Mitchelmore. In the ECBC case, the evidence of partisan appointments was apparent, whereas in the case of Carla Foote, it is speculative. The OCR does not mention patronage in its Reports, but does reference in its Initial Report the fact that Carla Foote is the daughter of Judy Foote,

current Lieutenant Governor and former federal Liberal cabinet minister, and also references that Ms. Foote worked for the Liberal party while it was in opposition. However, there was no evidence before the OCR that any of this played a role in Government's decision to move Ms. Foote to The Rooms, yet it appears this was a consideration of the OCR in reaching its conclusions. If Ms. Foote's alleged political connections were not a factor in the OCR's findings, it would not have mentioned them. To the extent the OCR relies on such conclusions to support its finding of gross mismanagement, it was relying on speculation. Another very important difference with the ECBC case is that three of the four appointees in the ECBC case came from outside the federal public sector and there was an established pattern to the appointments that was found to have "deviated from the norm". Carla Foote was already a Government employee whose transfer to The Rooms did not deviate from the norm as confirmed by the Clerk of the Executive Council.

On behalf of Minister Mitchelmore, we strenuously deny he committed any wrongdoing as defined in the Act, including any breach of the Code of Conduct (including principles 2, 4, 7, 8 and 10). In the OCR Reports there is little explanation as to how Minister Mitchelmore violated any particular provision of the Code of Conduct. Rather, there are conclusory statements on page 30 of its Initial report that "Minister Mitchelmore fundamentally mismanaged his obligations pursuant to the following provisions:...". When one reviews these principles in the Code of Conduct alleged to have been mismanaged (principles 2, 4, 7, 8 and 10), especially under the lens of the clarifications provided by the Clerk of the Executive Council, the only reasonable conclusion is that Minister Mitchelmore did not fundamentally mismanage or otherwise breach any principles of the Code of Conduct. For all the reasons discussed in this letter, in reference to principles 2, 4, 7, 8 and 10, we submit:

(2) there is absolutely no basis to conclude that Minister Mitchelmore did not act with integrity;

(4) there is absolutely no basis to conclude that Minister Mitchelmore did not act lawfully or that he did not act in a manner to protect the public interest or enhance public confidence – to conclude otherwise would require far more than was put forward by the OCR;

(7) there is absolutely no basis to conclude that Minister Mitchelmore did not base his conduct on the public interest or that he was in conflict of interest;

(8) there is absolutely no evidence Minister Mitchelmore did not apply public resources prudently or not for the purposes for which they were intended; and

(10) there is absolutely no basis to conclude that Minister Mitchelmore's relationships with government employees was other than professional and based upon mutual respect or that employees were prevented from being politically impartial.

On Minister Mitchelmore's behalf we strenuously deny he committed gross mismanagement and deny that corrective action is either appropriate or required.

We state again our concern that a finding of a breach of the Code of Conduct and/or a finding of gross mismanagement arising from the actions of Minister Mitchelmore in this case will have a significant impact and chilling effect on Government's ability to carry out human resource management. The Clerk of the Executive Council was clear that the efficient and effective management and operation of human resources within the public service requires the ability to move individuals in a manner that is now the subject matter before you. We respectfully request that you carefully review and consider the letter from the Clerk of the Executive Council.

If, however, you reach a conclusion that corrective action is required, when determining what is "appropriate action", we respectfully submit that any corrective action must be related to changes to human resources policies and practices of Government and not relate specifically to Minister Mitchelmore. None of the penalties in section 39 of the Act are appropriate as they would all require a finding of wrongdoing on the part of Minister Mitchelmore and they would all be inappropriate and excessive. In its Initial Report, the OCR referred to the Joyce Report, a case with a very different set of facts and with little to no precedential value other than for comparison purposes to illustrate that corrective action personal to Minister Mitchelmore would not be appropriate. The Clerk of the Executive Council has offered her clear and unequivocal opinion that Minister Mitchelmore did nothing wrong and followed policy and procedure.

We thank you for accepting and considering this submission. Please advise if you require any additional information or documentation relating to the public interest disclosure, the OCR's Reports or any related documents that you do not presently possess, but that you feel would be useful to your review.

Yours truly,

WADDEN PEDDIGREW HOGAN

Chris Peddigrew

CP/tg

