



Agency Application of Sections 35 and 40 of the NSIRA Act

CONTEXT

Section 35 of the *NSIRA Act* governs the issuance of NSIRA compliance reports in relation to an activity that, in NSIRA's opinion, may not be in compliance with the law. Such reports are submitted to the appropriate Minister and ultimately provided to the Attorney General of Canada (AG). NSIRA has articulated compliance reporting obligations in such a way as to encourage consistency in the reporting of possible non-compliance with the law. NSIRA has also adopted an approach to section 40 public interest reporting which is guided by consistent practice.

With regards to section 35 and determining when an activity “may not be in compliance with the law”, NSIRA's position is that:

1. The threshold captures possible as well as probable non-compliance but requires an objective basis for a finding of a possibility of non-compliance based on compelling and credible information.
2. “Law” includes common law, statutory law, international law and constitutional law.
3. NSIRA tailors each section 35 report to the relevant situation and indicates to the appropriate Minister and the AG its assessment of the incident's degree of severity.

With regards to section 40, NSIRA has outlined a non-exhaustive list of scenarios where a public interest report would be issued:

1. Where a section 35 compliance report relates to an illegality amounting to an offence;
2. Where a section 35 compliance report relates to conduct that may cause grievous bodily harm or death;
3. Where a section 35 compliance report relates to conduct amounting to a human rights violation;
4. Where a report finds conduct implicating the duties and functions of another review or oversight body, or branch of the state (e.g. the Courts), and NSIRA is not able to communicate the substance of the report directly to that entity; and
5. In any other instance where NSIRA concludes that the public interest requires the release of the report or its conclusions to Parliament

SECTION 35 REPORTING

Threshold

Section 35 of the *NSIRA Act* reads:

35 (1) The Review Agency must submit to the appropriate Minister a report with respect to any activity that is related to national security or intelligence and carried out by a department if, in the Agency's opinion, the activity may not be in compliance with the law. The Agency must give a copy of the report to the deputy head concerned.

(2) As soon as feasible after the Minister receives a report under subsection (1), he or she must give a copy of the report to the Attorney General of Canada, together with any comment that he or she considers appropriate in the circumstances

(3) The Minister must give a copy of anything given to the Attorney General of Canada under subsection (2) to the Review Agency at the same time.

NSIRA has refined its understanding of the evidentiary threshold to determine when an activity "may not be in compliance with the law". NSIRA understands this threshold to capture possible as well as probable non-compliance but requires an objective basis for a finding of a possibility of non-compliance based on compelling and credible information.

NSIRA's compliance reporting obligations must be seen in light of the Agency's broader purpose and the intent of Parliament in creating NSIRA. Rigorous reporting is compatible with NSIRA's role and commitment to ensuring transparency and accountability. Independence in section 35 reporting is paramount. A broad and inclusive understanding of the word "law" has been adopted by NSIRA to include common law, statutory law, international law and constitutional law. Every finding involving possible non-compliance with the law must lead to a section 35 report.

Format

NSIRA uses its expertise to situate section 35 reports in their proper context. This ensures that NSIRA communicates where the non-compliance in question fits into the broader scheme of the operations reviewed or investigated. NSIRA is thus able to contextualize its section 35 reporting within the larger spectrum of its findings and offer its unique perspective to characterize the given incident. Therefore, NSIRA tailors the narrative of each section 35 report to the unique circumstances relevant to the non-compliance.

Section 35 reports need not be a copy of an entire review or investigation final report. Although in some circumstances, such as systemic non-compliance, the entire review or investigation final report can be adopted as the section 35 report, this is the exception. More often, section 35

compliance reports are shorter reports or letters containing only the particular instances of non-compliance associated with the relevant finding discussed in context. In such cases, the language for the proposed section 35 compliance reports is included as a tear line annexed to the relevant report.

As stated above, section 35 compliance reports provide all the necessary contextual information to put incidents of possible non-compliance into perspective and highlight the steps taken by departments to mitigate the risk of recurring non-compliance where applicable. In this way, NSIRA indicates to the appropriate Minister and to the AG its appreciation and assessment of the degree of severity of the incident. This attenuates concerns that minor incidents of non-compliance are excessively amplified with a section 35 report.

When reporting on non-compliance that appears outside of the AG's role, NSIRA includes an explicit acknowledgement that it is reporting under the legal obligation to do so and, in this way, demonstrates its recognition that the AG may not be in a position to act upon the report.

Tracking and Trends

Compliance reporting may become a source of valuable information in the aggregate. In isolation, a violation may look exceptional or otherwise of minimal significance. However, within the broader spectrum of NSIRA's work over time, a seemingly innocuous incident of non-compliance may reveal a broader pattern of non-compliant conduct. For this reason, the comprehensive body of compliance reports is monitored for trends.

Timing of the Threshold's Application and Approval of the Section 35 Report

NSIRA ensures a consistent approach across business lines by applying the same compliance threshold for its reviews as well as its investigations. However, the timing of applying the threshold and the process of approving the section 35 report differs between reviews and investigations.

For reviews, subsection 8(3) of the *NSIRA Act* reads:

8(3) In the course of its reviews, the Review Agency may make any finding or recommendation that it considers appropriate, including findings and recommendations relating to

- (a) a department's compliance with the law and any applicable ministerial directions; and
- (b) the reasonableness and necessity of a department's exercise of its powers.

The section 35 compliance threshold should be applied at the point at which findings regarding compliance with the law are made pursuant to subsection 8(3), which is at the member approval stage of a review final product when the members meet with quorum as the Review Agency. This timing ensures consistency in the application of section 35 and any findings under subsection 8(3). This approach enables the members to approve the review findings, the full review report to be finalized under section 34, and the annexed language for the section 35 compliance report tear line in one meeting.

For investigations conducted under paragraph 8(1)(d) of the *NSIRA Act*, section 29 of the *NSIRA Act*, subsection 19(6) of the *Citizenship Act*, and subsection 46(1) of the *Canadian Human Rights Act* govern the reporting of findings. Section 35 is nonetheless triggered where a member finds possible non-compliance with the law in the course of an investigation. Pursuant to section 30 of the *NSIRA Act* and NSIRA practice, individual NSIRA members are assigned to investigate complaints. The assigned member applies the compliance threshold at the conclusion of an investigation when they finalize their report. To support consistency in the use of section 35 language while respecting the requirements of procedural fairness, plenary meetings with other NSIRA members are available to the assigned member, though neither imposed nor mandatory. If an assigned member has decided a matter and has found that an activity has met the non-compliance threshold, they may draft their section 35 language and then invite the other members to discuss the contextualization and language of the finding. At such a meeting, the assigned member may present a draft decision to the membership. No factual issues are discussed at this meeting, no voting or any other procedure to determine consensus is used, and no minutes or attendance are taken. If a new argument or policy arises in the meeting that may affect the ultimate decision, the parties must be given an opportunity to respond to it. The assigned members at all times must be able to decide the final outcome of an investigation according to their own conscience and opinion.

SECTION 40 REPORTING

The threshold

Subsection 40(1) of the *NSIRA Act* provides that:

40 (1) If the Review Agency is of the opinion that it is in the public interest to report on any matter related to its mandate, it may submit a special report to the appropriate Minister.

Section 40 public interest reports may be used to highlight findings of possible non-compliance that NSIRA views as significant. When a finding of possible non-compliance is made in a review

or in a complaint investigation, a tailored and contextualized compliance report is issued under section 35. When a particularly egregious incident of possible non-compliance is found, a section 40 report may be submitted for tabling. Section 40 also extends beyond issues of non-compliance. For this reason, NSIRA has outlined a non-exhaustive list of scenarios where a public interest report would be issued, which includes, but is not limited to:

- 1) Where a section 35 compliance report relates to an illegality amounting to an offence;*
- 2) Where a section 35 compliance report relates to conduct that may cause grievous bodily harm or death;*
- 3) Where a section 35 compliance report relates to conduct amounting to a human rights violation;*
- 4) Where a report finds conduct implicating the duties and functions of another review or oversight body, or branch of the state (e.g. the Courts), and NSIRA is not able to communicate the substance of the report directly to that entity; and*
- 5) Any other instance where NSIRA concludes that the public interest requires the release of the report or its conclusions to Parliament.*

As with section 35, a section 40 public interest report can arise from a review or a complaint investigation. The timing of the application of the threshold, the format and the procedure are the same as for the section 35 compliance report, with any necessary modifications.