



OFFICE OF THE CITIZENS' REPRESENTATIVE

**REPORT ON ACTIVITIES PURSUANT TO THE
*PUBLIC INTEREST DISCLOSURE AND WHISTLEBLOWER PROTECTION ACT***

JULY 1, 2014 – MARCH 31, 2015

August 31, 2015

**Office of the Citizens' Representative**

Province of Newfoundland and Labrador

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August 31, 2015

The Honourable Wade Verge, MHA
Speaker of the House of Assembly
St. John's, NL

Dear Mr. Speaker:

It is my duty and privilege to submit to the House of Assembly my report on the activities of the Office of the Citizens' Representative under the *Public Interest Disclosure and Whistleblower Protection Act* ("PIDA").

This report is submitted under Section 20(1) of PIDA, and covers the period between PIDA's commencement on July 1, 2014 and the fiscal year ending March 31, 2015. Future reports under PIDA will be submitted on a fiscal year basis.

Respectfully submitted,

Barry Fleming, Q.C.
Citizens' Representative

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Citizens' Representative's Message

On July 1, 2014, the *Public Interest Disclosure and Whistleblowing Protection Act* came into force and the Office of the Citizens' Representative (the "OCR") was named as the lead investigator. The Legislation represented a comprehensive program for the investigation of whistleblowing complaints and the protection from reprisals of whistleblowers and witnesses. It incorporates a mechanism whereby whistleblowers can seek advice from, and have their complaints investigated by, an independent agency separate and distinct from the executive branch of government. By contrast, many whistleblower programs in other jurisdictions require employees to first complain to a designate within their department or agency. That designate is then responsible for conducting an investigation. In these jurisdictions the ombudsman's role is to ensure the adequacy of the investigation. If the investigation is deficient, the ombudsman will conduct his or her own review.

The 1936 Soviet Union Constitution was widely regarded as containing one of the most eloquent and aspirational codifications of human rights. The promise of that document was never realized. Notwithstanding the comprehensive nature of the PIDA and to ensure its promise is fulfilled, two other conditions have to be met in order to guarantee that employees of the public service, and the general public, have confidence in the whistleblowing program. First, there has to be a commitment from members of the senior executive of all public bodies that there is value in the program and that our Office will have full cooperation when conducting investigations. I am happy to advise that my meetings with deputy ministers and heads of public bodies have been well received. More importantly, when we have initiated action under the PIDA we have been provided full cooperation from professional and motivated staff.

The other additional requirement to make the PIDA functional pertains to making the key facets of the program known to all public employees. This will require a persistent and creative effort from not just the OCR, but the senior executives as well. We hope to learn from our colleagues in other jurisdictions as to how best to disseminate useful information about the whistleblower program.

We have had 19 inquiries under the PIDA during its first nine months of existence. We have been able to provide comprehensive advice, extensive document review, and the conduct of thorough and expeditious investigations during this period. When we have not been able to take a complaint under the PIDA we have given employees detailed explanations as to why this is so. Alternatively, we have referred them to other appropriate investigatory bodies to have their concerns addressed, or we have used the powers under the *Citizens' Representative Act* to inquire into their concerns.

It took a number of years after the passage of the *Citizens' Representative Act* for the OCR to become a fully functioning, mature and well recognized ombudsman office. We will use the experience gained from this enterprise to ensure that all public employees will have access to an effective and well understood whistleblowing program. We look forward to the challenge.

The *Public Interest Disclosure and Whistleblower Protection Act*

Government brought PIDA into force on July 1, 2014. In doing so, it provided employees of the public service with a confidential program to bring forward matters and issues they believe should be halted or corrected in the public interest, with a clear cut method to penalize those who commit reprisals against disclosers. With the addition of whistleblower legislation in Newfoundland and Labrador, the investigation of wrongdoing by ombudsman and commissioners of various jurisdictions across Canada is now codified in seven provinces, together with the Government of Canada.

PIDA allows employees to make disclosures despite any rule that normally prohibits dissemination of information gained through their employment. Through their knowledge of how their own workplaces are supposed to function, public servants are uniquely situated to spot questionable activities and help the OCR identify wrongdoing earlier than might otherwise be possible. Employees have a critical role to play in the preservation of the integrity of the public service, and in minimizing harm to themselves, their co-workers, the environment, and the province's finances and assets. The OCR invites interested persons to view more information on the program on its website www.citizensrep.nl.ca or to contact the office at (709) 729-7647 or 1-800-559-0079.

Departments and Public Bodies Covered by PIDA

“Departments” are defined at Section 2(d) of PIDA as:

- A department created under the *Executive Council Act* and includes a branch of the executive government of the province.

“Public Bodies” are defined as:

- a corporation, the ownership of which or a majority of shares of which is vested in the Crown,
- a corporation, commission or body, the majority of the members of which, or a majority of the members of the board of directors of which are appointed by an Act, the Lieutenant Governor in Council or a minister,
- a school board or school district constituted or established under the Schools Act (1997), including the Conseil Scolaire Francophone, and,
- a corporation, commission or other body designated by regulation as a public body.

PIDA does not apply to employees of Memorial University.

What is a “Wrongdoing”?

Wrongdoing is defined in Section 4 of PIDA as:

4. (1) This Act applies to the following wrongdoings in or relating to the public service:
- an act or omission constituting an offence under an Act of the Legislature or the Parliament of Canada, or a regulation made under an Act;
 - an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment, other than a danger that is inherent in the performance of the duties or functions of an employee;
 - gross mismanagement, including of public funds or a public asset; and,
 - knowingly directing or counselling a person to commit a wrongdoing described in paragraph (a),(b) or (c).

PIDA applies only in respect of wrongdoings that occur after July 1, 2014.

What is “Gross Mismanagement”?

The Act does not define gross mismanagement. This permits the Citizens’ Representative to take a flexible approach when assessing potential disclosures. When assessing a potential disclosure, the Citizens’ Representative will ask if the allegations as stated are proven, would they engage any of the following:

- matters of significant importance;
- serious errors that are not debatable among reasonable people;
- more than a de minimus 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.

Not all of these factors have to be present before a disclosure is accepted for investigation. As well, the existence of one of the factors alone may not constitute wrongdoing for the purposes of the Act.

What is a “Reprisal”?

Reprisals fall within the legal mandate of the Newfoundland and Labrador Labour Relations Board. In considering whether a reprisal has occurred, the Labour Board must consider whether one or more of the following measures has been taken against an employee because he or she has, in good faith, sought advice about making a disclosure, made a disclosure, or cooperated in an investigation. These measures are:

- discipline,
- a demotion,
- termination of employment,
- a measure that adversely affects his or her employment or working conditions, or,
- a threat to take any of the above measures.

Services Anticipated by PIDA

PIDA anticipates three core services to government employees:

- (1) Advice to interested persons in response to inquiries about PIDA from OCR,
- (2) Investigations of jurisdictional public interest disclosures by OCR, and,
- (3) Legal sanctions imposed by the Labour Board against those who are found to have committed a reprisal against a discloser.

Inquiries

Section 6 of the PIDA outlines that an employee who is considering making a disclosure may request advice from the Citizens’ Representative. For reporting purposes, we consider the provision of advice and any communications prior to the registration of a formal written disclosure an “inquiry” as anticipated by Section 20 of PIDA. There are times when employees question whether a decision or action in their workplace would qualify as a wrongdoing under PIDA. Sometimes they may have questions about the protections afforded by PIDA, the mechanics of the OCR process, or what other options may be available to them. If the allegations made during the inquiry don’t meet the legal test contained in PIDA, in many cases the OCR is still able to provide referral advice, tips for self-advocacy, or commencement of a traditional ombudsman investigation under the *Citizens’ Representative Act*.

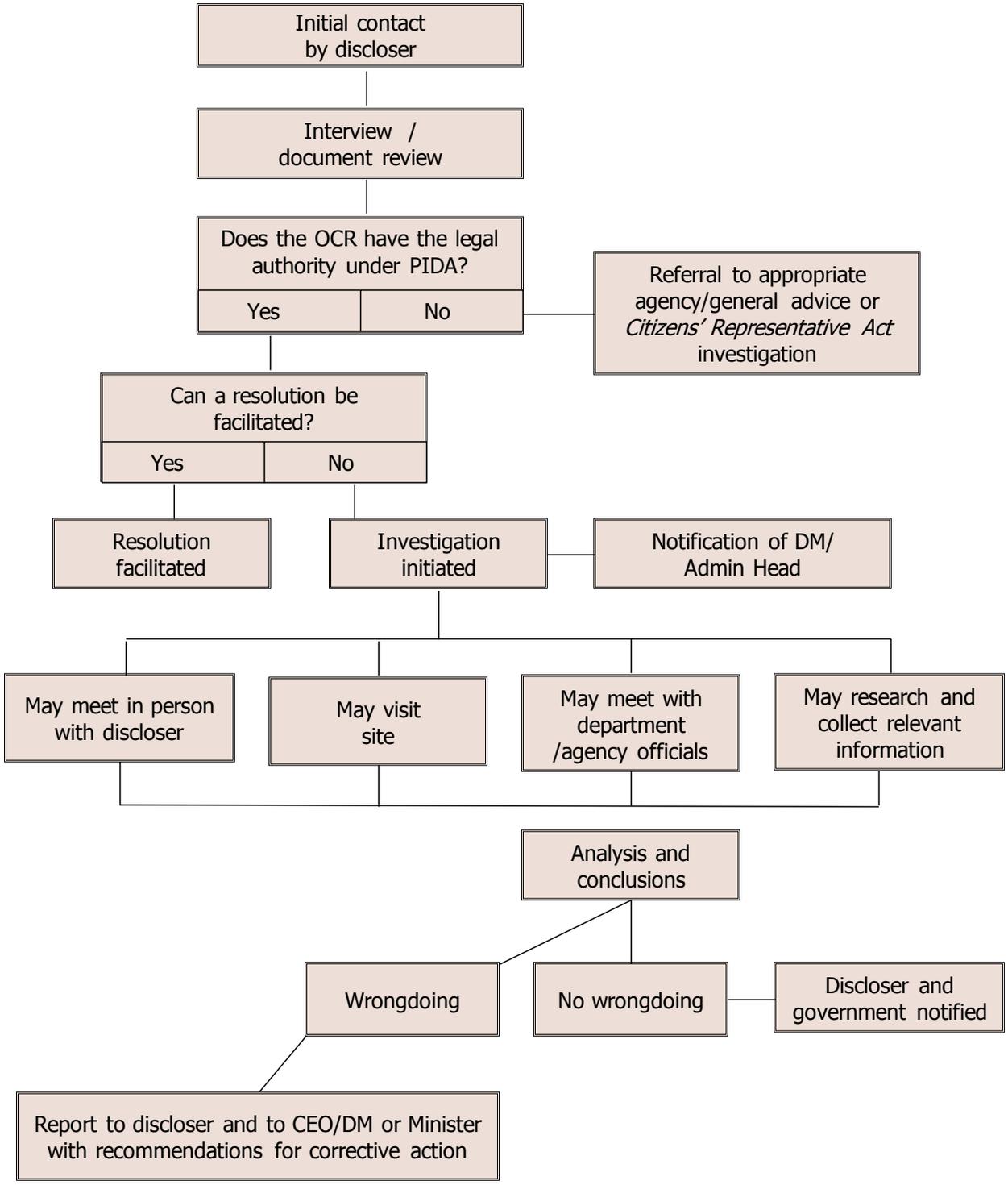
The process of answering inquiries and providing advice under PIDA is not always as simple as a brief conversation. In most cases there are multiple meetings, telephone calls, and evidentiary reviews that have to take place in the initial phase of a disclosure. Some callers wish to remain anonymous or make contact through anonymous email accounts until they are comfortable with the PIDA process. The advice process may also require the employee to gather additional evidence of wrongdoing, or provide other information that the OCR needs to practically initiate a PIDA investigation. In some cases the employee is upset by what he or she is witnessing in their workplace. In other cases the employee is in a state of crisis, depression, financial hardship, moral dilemma, or feels victimized. Sometimes periods of personal reflection are required between the provision of advice and the making a formal disclosure.

Public Interest Disclosures

Public interest disclosures by employees are covered in Section 7 of PIDA, and are required to be in writing pursuant to Section 8. A written disclosure usually follows a period of inquiry. Upon receipt it is analyzed and the employee may be contacted by the OCR to clarify the disclosure if necessary, or probe other areas that may not be covered. Disclosures are investigated as informally as possible using the suite of investigative powers contained in the *Citizens' Representative Act*. In some cases, unsolicited written disclosures may not meet the test for wrongdoing under PIDA, but can still be fully investigated in a private and confidential manner under the *Citizens' Representative Act*.

A written disclosure of wrongdoing that has legal merit, and is made by an employee about a jurisdictional public body is formally investigated under PIDA. The investigation process is set out in the following chart.

The Disclosure Process



Statistics

Section 20(1) of PIDA requires specific reporting by the Citizens' Representative under six areas of activity. Results for July 1, 2014 through March 31, 2015 are addressed below in the order that they appear in Section 20:

TABLE 1 – PIDA Section 20 Compliance Results

| PIDA Subsection | Results |
|---|--|
| 20(1)(a): Number of inquiries relating to PIDA. | 19 |
| 20(1)(b): Number of disclosures received and number acted on and not acted on. | Of 19 inquiries, 3 formal disclosures received. 2 acted on under PIDA. 1 acted on under <i>Citizens' Representative Act</i> . 0 not acted on. |
| 20(1)(c): Number of investigations commenced under PIDA. | 2 |
| 20(1)(d): Number of recommendations the Citizens' Representative has made and whether the department or public body has complied with the recommendation. | 0 |
| 20(1)(e): Whether, in the opinion of the Citizens' Representative, there are any systemic problems that give rise to wrongdoings. | N/A |
| 20(1)(f): the recommendations for improvement that the Citizens' Representative considers appropriate. | N/A |

The following table outlines the inquiries and disclosures received by the OCR under PIDA, and relays the status and/or disposition of each matter as of March 31, 2015. Each has been anonymized to protect the identity of persons involved.

TABLE 2 – Inquiries and Disclosures Received (July 1 2014 – March 31 2015)

| PIDA Subsection | Inquiry / Disclosure | Status / Disposition |
|---|---|---|
| 4(1)(a) an act or omission constituting an offence under an Act of the Legislature or the Parliament of Canada, or a regulation made under an Act. | Whether a potential wrongdoing meets the criteria of an offence. | Advice provided. No further contact with discloser. |
| 4(1)(b) an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment, other than a danger that is inherent in the performance of the duties or functions of an employee. | Substantial risk to health and safety of employees in a publicly held building. | Under investigation. |
| | Substantial risk to health and safety of employees in a publicly held building. | Declined. Matters described did not constitute a substantial risk. OHS / union options available. |
| 4(1)(c) gross mismanagement, including of public funds or a public asset. | Gross mismanagement of funds where cost savings readily available. | Under investigation. |
| | Gross mismanagement of human resource issue. | Declined. Matter previously investigated under <i>Citizens' Representative Act</i> . |
| | Gross mismanagement of human resource investigation. | Referred internally for investigation under the <i>Citizens' Representative Act</i> . |

| | | |
|--|--|--|
| <p>4(1)(c) gross mismanagement, including of public funds or a public asset. (Continued)</p> | <p>Gross mismanagement of human resource investigation.</p> | <p>Declined. Matter currently before arbitration / court of law.</p> |
| | <p>Gross mismanagement of training regime / hiring practices / collective bargaining rights.</p> | <p>Declined. Matter set to go to binding arbitration.</p> |
| | <p>Gross mismanagement of funds in construction.</p> | <p>Matter deemed <i>prima facie</i> jurisdictional. Advice provided; however, no formal disclosure made.</p> |
| | <p>Gross mismanagement of amalgamation of public bodies.</p> | <p>Declined under limitation in Section 4(2) of PIDA. Circumstances occurred approximately 20 years ago.</p> |
| | <p>Gross mismanagement of a public body.</p> | <p>Advice provided on definition of wrongdoing. Discloser(s) agreed activities did not meet test.</p> |
| | <p>Gross mismanagement of public asset.</p> | <p>Discloser not an employee or officer of the public service as anticipated by PIDA s. 2(g). Discloser had no intimate knowledge. Referral to local law enforcement encouraged.</p> |
| | <p>Gross mismanagement of HR issues / termination of employment.</p> | <p>Advice provided. Matter deemed <i>prima facie</i> jurisdictional but no formal disclosure made.</p> |

| | | |
|--|---|--|
| <p>4(1)(c) gross mismanagement, including of public funds or a public asset. (Continued)</p> | <p>Gross mismanagement of HR issues / termination of employment.</p> <p>Gross mismanagement of public funds.</p> <p>Gross mismanagement of public funds.</p> <p>Gross mismanagement of a public asset.</p> <p>Gross mismanagement of a human resource issue.</p> <p>Gross mismanagement of paid leave system.</p> | <p>Referred internally for investigation under the <i>Citizens' Representative Act</i>.</p> <p>Advice provided on options under PIDA and <i>Citizens' Representative Act</i>. No formal disclosure made.</p> <p>Discloser not an employee or officer of the public service as anticipated by PIDA s. 2(g). Advice provided about referral options and/or investigation under <i>Citizens' Representative Act</i>.</p> <p>Matter referred internally for investigation under the <i>Citizens' Representative Act</i>.</p> <p>Matter referred internally for investigation under the <i>Citizens' Representative Act</i>.</p> <p>Advice provided. Matter deemed <i>prima facie</i> jurisdictional but no formal disclosure made.</p> |
| <p>4(1)(d) knowingly directing or counselling a person to commit a wrongdoing described in paragraphs (a)(b) or (c).</p> | <p>0</p> | <p>N/A</p> |

Outreach and Promotion

The OCR has developed a presentation on public interest disclosures, and how the OCR processes and acts on allegations of wrongdoing. During the past year, sessions have been offered at:

- a meeting of provincial government Deputy Ministers;
- a meeting of policy developers from various Departments;
- the Department of Education and Early Childhood Development;
- Eastern Health (Senior Executive);
- Western Health (Senior Executive);
- Western Health (Annual General Meeting).

In addition, promotional materials were distributed to employees at all major entrances to the Confederation Building complex on October 16, 2014.

The Road Ahead

Since being named the investigator of public interest disclosures for the House of Assembly under Part VI of the *House of Assembly Accountability, Integrity and Administration Act* in 2007, the OCR has been monitoring best practices and national trends in public interest disclosure. We have benefitted greatly from the inroads already made by our national ombudsman and commissioner counterparts at the provincial and national levels. The OCR stands committed to providing employees with a confidential, secure, and vigorous system of public interest disclosure investigation.

We will continue to promote the Public Interest Disclosure Program throughout the public service, as well as build our knowledge base in this important and emerging area of public policy.