



OFFICE OF THE CITIZENS' REPRESENTATIVE

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

APRIL 1, 2016 – MARCH 31, 2017

JULY 4, 2017



Office of the Citizens' Representative

Province of Newfoundland and Labrador

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July 4, 2017

The Honourable Tom Osborne, 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*.

This report is submitted under Section 20(1) of the Act, and covers the 2016-17 fiscal year.

Respectfully submitted,

Barry Fleming, Q.C.
Citizens' Representative

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Citizens' Representative's Message

For 2016-17, the Office of the Citizens' Representative received six inquiries under the Public Interest Disclosure and Whistleblower Protection Act (the "Act").

In an excellent Paper commissioned by the federal Office of the Public Sector Integrity Commissioner entitled *The Sound of Silence*, Craig Dowden, Ph.D., outlined three psychological factors which often deter people from blowing the whistle when a situation warrants action. The first is a diffusion of responsibility to act. As part of a group, we sometimes expect someone else to act. The second deals with the role of social influence. Simply stated, an employee is less likely to blow the whistle if a co-worker's reaction is to suggest that everything is normal.

A final psychological factor mitigating an employee's call to action to blow the whistle is the cost associated with being wrong. Employees worry about the embarrassment, stigma and angst associated with filing a complaint unnecessarily.

As we continue our outreach efforts over the upcoming year, we will be mindful of these factors as we engage with public employees who have concerns about wrongdoing.

The Public Interest Disclosure and Whistleblower Protection Act (“PIDA”)

Introduced in 2014, the PIDA provides employees of the public service with a confidential method of bringing forward allegations they believe should be investigated and corrected in the public interest. PIDA can impose penalties, including termination of employment, against anyone who commits a reprisal against an employee who brings a disclosure forward. Misleading or obstructing an investigation by OCR, or falsifying or destroying documents can also result in fines of up to \$10,000.

Disclosures can be made despite any rule that normally prohibits dissemination of information gained through employment with the Government of Newfoundland and Labrador. Government employees have a crucial role to play in the preservation of the integrity of the provincial public service, and in minimizing harm to themselves, their co-workers, the environment, and the province’s finances and assets.

The Office of the Citizens’ Representative (“OCR”) invites interested persons to view more information on the program under the “Whistleblowers” tab 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, which has its own disclosure process.

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 PIDA does not define gross mismanagement; instead, the OCR takes a flexible approach when assessing potential disclosures. Generally, when analyzing written disclosures or interviewing government employees, 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*, 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.

Not all of these factors have to be present before a disclosure is accepted for investigation. The existence of one of the factors alone may not constitute wrongdoing for the purposes of the PIDA and the Citizens' Representative will frequently consider investigating the matter of his own volition (without a named discloser) via the *Citizens' Representative Act*.

What is a "Reprisal"?

Reprisals fall within the legal mandate of the Newfoundland and Labrador Labour Relations Board. Under the PIDA, the 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 are unsure about whether a decision or action in their workplace qualifies as a "wrongdoing" under PIDA. From time to time employees are looking for

information about the legal protections afforded by PIDA, how the investigative process works, or what other avenues exist to possibly resolve their concerns. In some cases, the processes necessary to do so are already underway, but frustration exists with the time being taken to resolve the matter.

The process of answering inquiries and providing advice under PIDA differs in some ways from our normal Ombudsman work. In many instances meetings, telephone calls, and evidentiary reviews are required in the initial phase. Most 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 requested by OCR to provide a more solid foundation for investigation. In some cases the employee is frustrated 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 making a formal disclosure. The process sometimes results in the caller shrinking back into anonymity, only to return months later with additional questions.

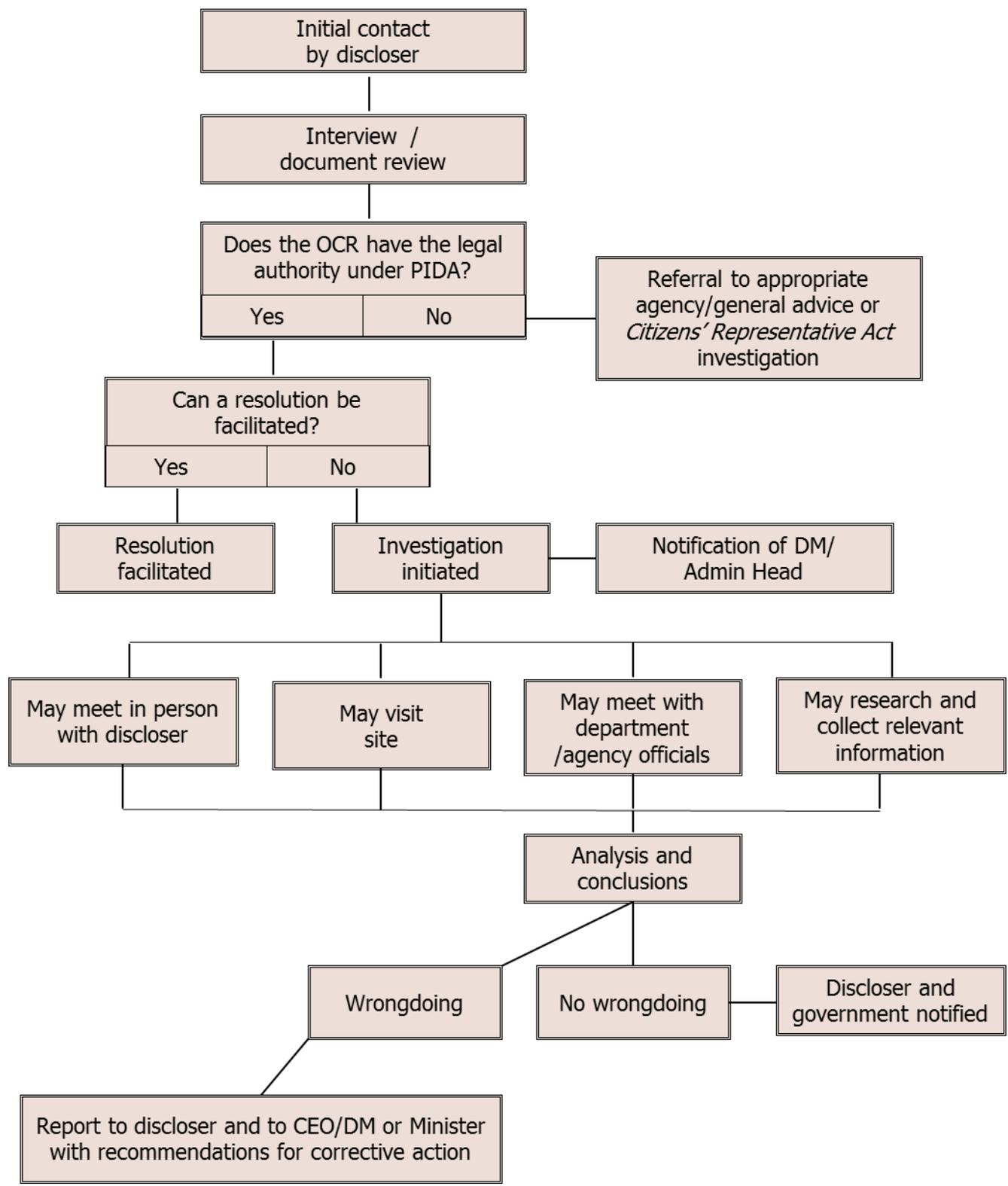
Public Interest Disclosures

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. OCR analyzes the form and the accompanying evidence against a series of criteria to establish jurisdiction. The employee may be contacted by OCR to clarify the disclosure if necessary, establish timeframes or identities of subjects named in the disclosure, or probe other areas that may not be covered.

Disclosures are investigated as informally as possible. In some cases, unsolicited written disclosures may not meet the test for wrongdoing under PIDA, but can still be fully investigated in a confidential manner under the *Citizens' Representative Act*.

A written disclosure of wrongdoing that has *prima facie* merit, and is made by a government employee about a jurisdictional public body, is formally investigated under PIDA. The investigation process is set out below.

The Disclosure Process



Update On Investigations

OCR's 2015-16 PIDA report indicated OCR was investigating a disclosure made by a government employee who alleged gross mismanagement of a government program in conflict with the goals of legislation relating to the program.

In addition to interviews with the employee, we met on two occasions with senior executives of the Department involved, who cooperated fully throughout the investigation. During the investigation we reviewed considerable documentary evidence and conducted cross-jurisdictional research on the topic at issue. Our investigation raised serious concerns about the process used by the Department with respect to the program, and reminded the Department that any process that deviates from well-established and time-tested processes must be clearly approved after considerable consultation and dissemination. OCR recommended:

1. Proceedings and minutes of the entity concerned should reflect modern corporate governance imperatives when dealing with notices of motion, resolution and approval;
2. Minutes of the entity concerned should be available on the Department's website; and,
3. Any future policy or program which is considered by the entity concerned which alters or modifies the process at issue should be subject to wide and open consultation, transparent approval and must be widely accessible to the public.

The Department involved stated "the Department takes all investigations conducted by your office seriously and appreciates the opportunity to work with your office on whistleblower investigations relating to this Department...the Department accepts all recommendations noted in your report and will be taking appropriate action to ensure all recommendations are implemented."

Statistics

Section 20(1) of PIDA requires specific reporting by the Citizens' Representative in six areas of activity. Results for April 1, 2016 through March 31, 2017 are addressed below in the order that they appear in Section 20. The Office of the Citizens' Representative considered six (6) allegations during the last fiscal year.

TABLE 1 – PIDA Section 20 Compliance Results

PIDA Subsection	Results
20(1)(a): Number of inquiries relating to PIDA	6
20(1)(b): Number of disclosures received and number acted on and not acted on	<p>Of 6 inquiries, 0 formal written disclosures received.</p> <p>1 set of allegations under analysis as of 31 March 2016.</p> <p>3 sets of allegations acted on under <i>Citizens' Representative Act</i>.</p> <p>2 potential disclosers provided advice</p> <p>0 not acted on.</p>
20(1)(c): Number of investigations commenced under PIDA	0
20(1)(d): Number of recommendations the citizens' representative has made and whether the department or public body has complied with the recommendation	<p>3 stemming from 2015-16 investigation.</p> <p>3 complied with.</p>

<p>20(1)(e): Whether, in the opinion of the citizens' representative, there are any systemic problems that give rise to wrongdoings</p>	<p>N/A</p>
<p>20(1)(f): the recommendations for improvement that the citizens' representative considers appropriate</p>	<p>3 recommendations from investigation commenced FY 2015-16. (Investigation closed November 8, 2016.)</p> <ul style="list-style-type: none"> (1) Proceedings and minutes of the entity concerned should reflect modern corporate governance imperatives when dealing with notices of motion, resolution and approval; (2) Minutes of the entity concerned should be available on the Department's website; (3) Any future policy or program which is considered by the entity concerned which alters or modifies the process at issue should be subject to wide and open consultation, transparent approval and must be widely accessible to the public.

The following table outlines the inquiries and disclosures received by OCR under PIDA, and relays the status and/or disposition of each matter as of March 31, 2017. Each has been anonymized to protect the identity of persons involved.

TABLE 2 – Inquiries and disclosures received (April 1, 2016 – March 31 2017)

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.	N/A	N/A
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.	N/A	N/A
4(1)(c) gross mismanagement, including of public funds or a public asset.	Gross mismanagement of a human resource issue and reprisals in relation to employee contract renewal.	Under analysis as of March 31, 2017.

<p>(1)(c) gross mismanagement, including of public funds or a public asset. (Continued)</p>	<p>Gross mismanagement of a human resource issue: termination of employment based on complaints about public safety issue that was subsequently addressed.</p>	<p>Provision of advice under PIDA. Matter approved for investigation under <i>Citizens' Representative Act</i>. Complainant would not submit written account of allegations as required by <i>Citizens' Representative Act</i>. Complaint file closed.</p>
	<p>Gross mismanagement of a human resource issue: serial inaction by branch manager to control worker habitually late for work.</p>	<p>Matter did not meet internal criteria for finding of gross mismanagement. Referred for inquiry under <i>Citizens' Representative Act</i>. Regional management notified of allegations and branch manager ordered to bring matter under control.</p>
	<p>Re-occurrence: serial inaction by branch manager to control worker habitually late for work.</p>	<p>Follow up with regional management under <i>Citizens' Representative Act</i>. Employee reminded of obligations. Lateness being monitored. Discipline within realm of possibility.</p>
	<p>Gross mismanagement of a public body by Executive Director</p>	<p>Issues outlined did not constitute gross mismanagement. Provision of advice.</p>

	Gross mismanagement of public funds in relation to forcing return to employment and paying salary when employee was eligible to be paid out of grant funding from another public body.	Matter did not constitute <i>prima facie</i> gross mismanagement. Matter currently with responsible labour union with settlement meetings impending. Possibility of investigation under <i>Citizens' Representative Act</i> if matter not settled. No further contact from individual.
4(1)(d) knowingly directing or counselling a person to commit a wrongdoing described in paragraphs (a)(b) or (c).	N/A	N/A