

PUBLIC INTEREST DISCLOSURE AND WHISTLEBLOWER PROTECTION ACT

Annual Report 2020-2021



**OFFICE OF THE CITIZENS'
REPRESENTATIVE**
PROVINCE OF NEWFOUNDLAND AND
LABRADOR



Office of the Citizens' Representative
Province of Newfoundland and Labrador

July 31, 2021

The Honourable Derek Bennett, MHA
Speaker of the House of Assembly
Confederation Building
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** ("the Act").

This Report is submitted under Section 20(1) of the Act, and covers the 2020-21 Fiscal Year.

Yours truly,

Bradley J. Moss
Citizens' Representative

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Citizens' Representative Message



As part of our mission to provide independent and non-partisan oversight on behalf of the House of Assembly, the Office of the Citizens' Representative ("OCR") oversees two whistleblower programs, which apply to the Legislative and Executive branches of government. This report covers our 2020-21 activities under the program enabled by the **Public Interest Disclosure and Whistleblower Protection Act** ("PIDA"), which applies to the Executive branch.

PIDA was designed to detect and deter breaches of policy, statutes and subordinate legislation, and to protect our public institutions against wrongdoing, including waste of public funds, misuse of public assets, or a substantial and specific danger to public health or safety. In addition, PIDA is specific on outlawing reprisals against those who seek advice or bring information forward.

Information and assistance from a discloser who has evidence and a set of credible allegations can be extraordinarily powerful in correcting wrongdoing. Through their knowledge of their workplace, whistleblowers can aid OCR in identifying statutory, regulatory and policy breaches before they become much larger problems. Their courage in coming forward in confidence allows OCR to minimize harm to our institutions and finances, and hold wrongdoers to account.

As the statistics show, 2020-21 was a relatively quiet year under this program. Internally, we speculated that the global pandemic and the mass exodus of government workers to work-from-home set-ups not only decreased personal contact in traditional government work spaces, but also forced employees to focus more on innovative delivery of core mandate services, as well as their own personal health and well-being. Those who approached OCR during the past year still need to be commended; they brought forward information for assessment, which they believed should be investigated and corrected in the public interest.

OCR remains ready to provide fair, independent, objective and professional oversight under the PIDA. I sincerely appreciate the exceptional work of OCR personnel as they assist me with this work, and I thank them for their dedication to this important program.

A handwritten signature in blue ink that reads "Bradley J. Moss". The signature is stylized and written in a cursive-like font.

Bradley J. Moss
Citizens' Representative

The Public Interest Disclosure and Whistleblower Protection Act

Public service employees generally ensure the responsible and fair provision of services to citizens of the province. By extension, public service employees may acquire intimate knowledge of internal problems within government and its various agencies, boards and commissions. They have a crucial role to play in keeping their workplaces safe and respectful for themselves; keeping all aspects of government operations free from gross mismanagement; reporting suspected statutory offences; and protecting our environment. It is important to provide employees with a confidential, impartial and supportive avenue to disclose, discuss and work towards mitigation of the identified problem.

The **Public Interest Disclosure and Whistleblower Protection Act** (PIDA) provides the right to current employees to disclose wrongdoing within their organization and the right to be protected from reprisal for doing so. These rights reinforce the key

values of integrity and accountability in the public sector.

The PIDA provides an avenue for employees of the public service to come forward in a confidential manner with allegations of specific wrongdoing they believe should be investigated and rectified in the public interest. Employees should know there are no statutory or procedural bars that apply to disseminating sensitive government information in a public interest disclosure made to the Citizens' Representative, other than solicitor-client privilege and the deliberations of Cabinet or a committee thereof.

The PIDA contains penalties, including job loss, against wrongdoers or any person who commits a reprisal against an employee suspected of disclosing in the public interest. Misleading the Citizens' Representative or his investigators, or falsifying or destroying evidence is punishable under the PIDA, and can result in personal fines of up to \$10,000.

Departments and Public Bodies Covered by the PIDA

“Departments” are defined at Section 2(e) of the 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 at section 2(h) 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.

Memorial University has its own internal disclosure process and is exempt from investigation under the PIDA.

Employees and Members of the House of Assembly also have access to a process comparable to that under the PIDA. However, any such disclosures or inquiries are referred for possible investigation under the **House of Assembly Accountability, Integrity and Administration Act**.

What is a “Wrongdoing”?

Wrongdoing is defined in Section 4(1) of the PIDA:

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).

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

What is “Gross Mismanagement”?

The PIDA does not specifically define gross mismanagement. This permits a flexible approach when assessing potential disclosures. Generally, 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;
- something 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.

Post-investigation, consideration of gross mismanagement would also be present in cases with credible evidence showing the application of management responsibilities in a manner grossly deviating from the standard of care or competence that a reasonable person would follow in the same situation.

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

In cases that don't meet these threshold tests, the Citizens' Representative will consider, in his discretion, investigating the matter via Section 15 of the **Citizens' Representative Act**, without a named individual. The resulting "Ombudsman own motion" investigation may go on to identify breach of duty or misconduct on behalf of a government employee.

Public Interest Disclosures

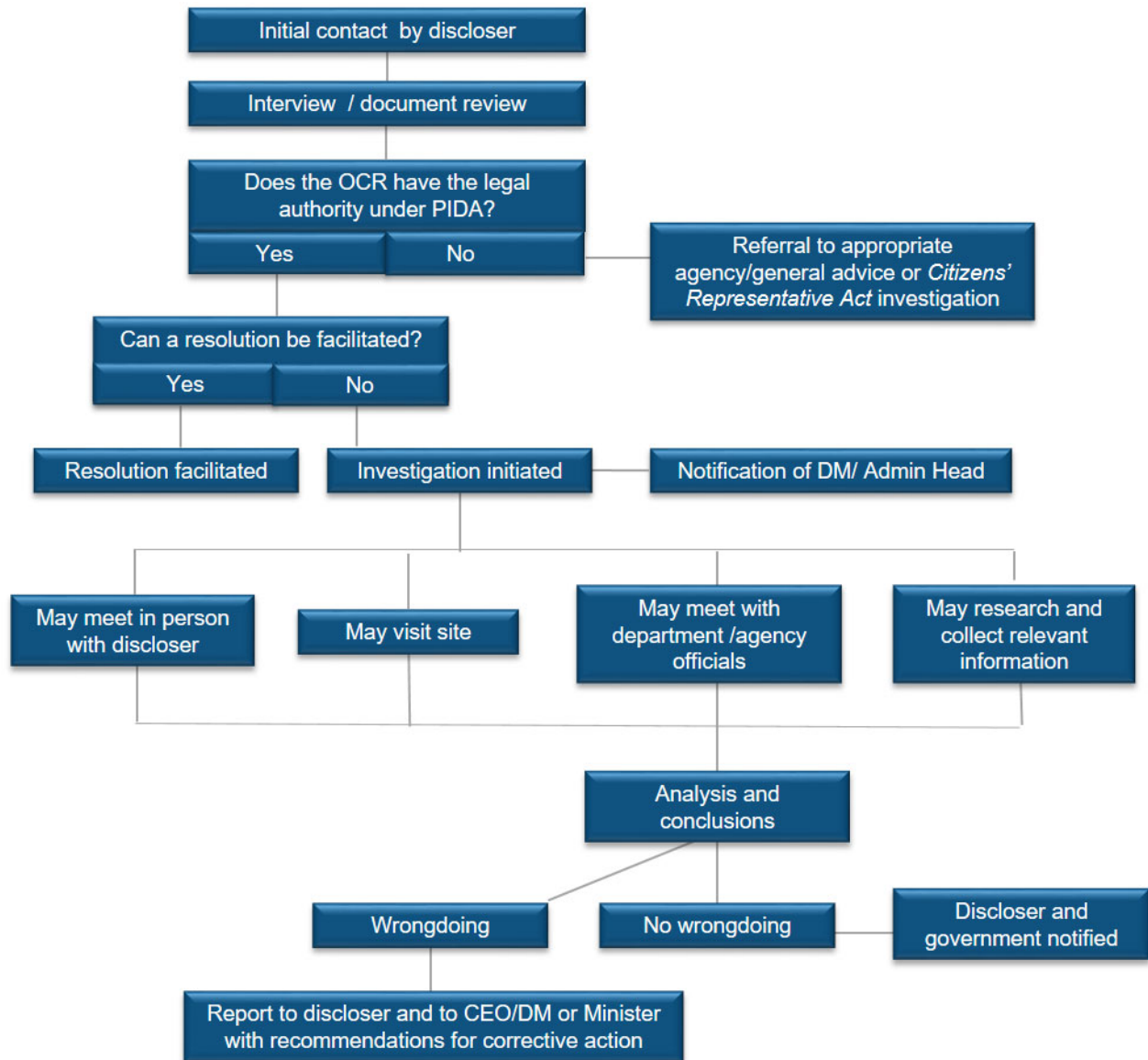
Public interest disclosures are required to be in writing pursuant to Section 8 of the PIDA. A written disclosure usually follows a period of inquiry, as previously described. In some cases, the completed forms and evidence arrives in a package, or via a solicitor.

OCR invests the time necessary to thoroughly analyze the evidence, clarify key allegations or probe other areas that may not be covered in the written disclosure.

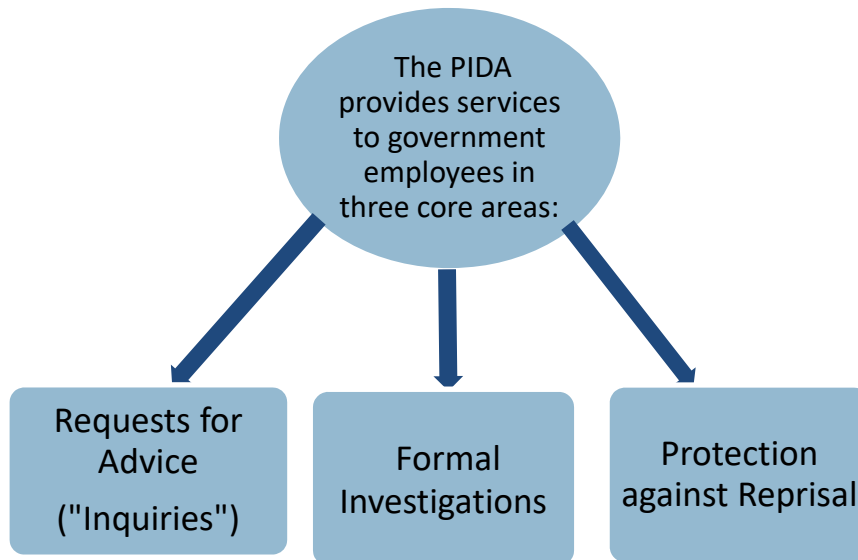


A written disclosure of wrongdoing that has *prima facie* merit, and is made by a government employee about a jurisdictional public body, is formally investigated under the PIDA. The investigation process is set out in the following chart.

The Disclosure Process



Services Provided Under PIDA



Requests for Advice ("Inquiries")

Section 6 of the PIDA states "an employee who is considering making a disclosure may request advice from the Citizens' Representative."

We consider the provision of advice and any communications prior to the registration of a formal written disclosure an "inquiry" as anticipated in Section 20. In some cases, prospective disclosers are seeking information on:

- the blanket legal protections afforded by the PIDA;
- protections against the disclosure of their identity;
- how the investigative process works; or
- the best way to remedy their issue and discuss their dilemma.

In some cases, there are already collective bargaining, court, HR or quasi-judicial processes that are underway, that may be stalled, or recently concluded.

The PIDA cases differ from our normal Ombudsman work with the general public who are experiencing difficulties with the public service. Employees may be hesitant to formally engage the process, and desire anonymity in the initial stages until some measure of comfort is found with formally disclosing in writing.

The inquiry process may also require the employee to provide more concrete evidence of wrongdoing over and above simple allegations in order to provide a more solid basis for investigation. In some cases, the employee is in a state of crisis, depression, financial hardship, or feels victimized. Sometimes, periods of personal reflection exist between the initial provision of advice and a formal disclosure.



Formal Investigations

Section 14 of the PIDA requires that disclosures are investigated as informally and expeditiously as possible. It further ensures the right to procedural fairness and natural justice to persons making disclosures, witnesses and persons alleged to be responsible for wrongdoings.

Written disclosures may not meet the initial test for wrongdoing under the PIDA, but can still be fully investigated in a confidential manner under the Ombudsman legislation and process.

Section 13 of the PIDA provides the purpose of an investigation into a disclosure of wrongdoing as bringing the wrongdoing to the attention of the public body and recommending corrective measures that should be taken.

There may be occasions whereby a formal disclosure has not been submitted, yet the allegations informally brought forward remain of concern. In the situation where an informal disclosure gives the appearance of the allegations, if accurate, meeting the threshold of a wrongdoing, these allegations can be brought forward to the head of the public body for internal assessment. Any such action would be carried out in the public interest while maintaining protection for the identity of the whistleblower(s).

Protection Against Reprisal

A reprisal is typically a measure taken against someone who either comes forward with allegations, seeks advice, or is a witness who participates in an investigation. Reprisals are prohibited under the PIDA.

Reprisals are defined in Section 2(j) as:

- 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.

Reprisals fall within the jurisdiction of the Newfoundland and Labrador Labour Relations Board. Under the PIDA, upon receipt of a reprisal allegation, the Board must consider whether one or more of the Section 2(j) 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.

Upon finding convincing evidence of a reprisal the Board may order that a person:

- be permitted to return to his or her duties;
- be reinstated or have damages paid where the Board considers that the trust relationship between the parties cannot be restored;
- receive compensation for lost wages that would have been paid but for the reprisal;
- receive compensation for expenses or other financial losses incurred as a direct result of the reprisal.

In addition, the Board may:

- order that the activity that constitutes the reprisal cease;
- order that the situation resulting from the reprisal be rectified; and,
- order that a person “do or refrain from doing anything in order to remedy a consequence of the reprisal.

Update on Investigations

One formal inquiry remained under assessment at the end of fiscal year 2019-20. During the current fiscal year, 2019-20, this formal inquiry remains under assessment. At the time of the initial inquiry, all accounts indicated that the responsible public body was aware of the allegations and had determined that an internal review would occur with the intention to publicly report the outcome. While maintaining contact with the responsible public body, there was no indication of the release of a public report following the committed internal review. Upon notification of whether an internal review has been completed, further assessment of the formal inquiry will proceed.

Statistics

Section 20(1) of the PIDA requires specific reporting by the Citizens' Representative in six areas of activity.

Results for April 1, 2020 through March 31, 2021, are addressed below in the order that they appear in Section 20.

We considered allegations from four (4) individuals under the PIDA during 2020 - 21.

Of interest, the OCR is also responsible for public interest disclosures under Part VI of the **House of Assembly Accountability, Integrity and Administration Act** (HOAAIAA). While there is no obligation to report these statistics under the PIDA, it is worthy to note that we considered two (2) allegations under the HOAAIAA, separate and apart from those received under the PIDA.

Table 1 – The PIDA Section 20 Compliance Results

The PIDA Subsection	Results
20(1)(a): Number of inquiries relating to the PIDA.	4
20(1)(b): Number of disclosures received and number acted on and not acted on.	Of the 4 inquiries: <ul style="list-style-type: none"> ▪ 0 formal written disclosures received; ▪ 4 potential disclosers provided advice; ▪ 1 potential disclosure was referred to law enforcement; ▪ 0 migrated to formal investigation under the PIDA; ▪ 1 potential disclosure remained under assessment at the end of the fiscal year.
20(1)(c): Number of investigations commenced under the PIDA.	0 investigations commenced under the PIDA.
20(1)(d): Number of recommendations the Citizens' Representative has made and whether the department or public body has complied with the recommendation.	0 during FY 2020-2021
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 our office under the PIDA, with the status and/or disposition of each matter listed as of March 31, 2021.

**Table 2 – Inquiries and Disclosures Received
April 1, 2019 – March 31, 2020**

The 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.	Inquiry re: offence under the Criminal Code. Referral to law enforcement, matter remains active in justice system.	Provision of advice.
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.	Inquiry re: an act or omission that creates a substantial and specific danger to the life, health or safety of persons. This matter was also disclosed to the responsible department where redress should occur.	Provision of advice.
4(1)(c) gross mismanagement, including of public funds or a public asset.	Inquiry re: gross mismanagement. Inquiry re: gross mismanagement.	Provision of advice. Discloser opted not to proceed with formal disclosure. Provision of advice. Allegations remain under assessment at the end of fiscal year.
4(1)(d) knowingly directing or counselling a person to commit a wrongdoing described in paragraph (a), (b) or (c).	N/A	N/A

There were no investigations commenced under the PIDA during the fiscal year 2020-21. One disclosure received during the 2020-21 fiscal year remains under assessment.

In each of these situations, disclosers were provided with advice in relation to the managing and appropriate outlet for their allegations.



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