



PUBLIC INTEREST DISCLOSURE AND WHISTLEBLOWER PROTECTION ACT

Annual Report 2019-2020



**OFFICE OF THE CITIZENS'
REPRESENTATIVE**

PROVINCE OF NEWFOUNDLAND AND
LABRADOR



Office of the Citizens' Representative
Province of Newfoundland and Labrador

July 31, 2020

The Honourable Scott Reid, 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 2019-20 Fiscal Year.

Yours truly,

A handwritten signature in blue ink, appearing to read 'Bradley J. Moss', with a stylized flourish at the end.

Bradley J. Moss
Citizens' Representative

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Citizens' Representative Message

It is an honour and a privilege to submit my Public Interest Disclosure Report to the House of Assembly for 2019-20. Public Interest Disclosure Programs form two of our four overall business lines within the Office of the Citizens' Representative ("OCR").

In addition to my public role as Ombudsman, and the designated Investigator of allegations of wrongdoing and harassment within the House of Assembly, I oversee a secure channel for public servant disclosures. These disclosures (commonly known as whistleblowing) include violations of law, rules, or regulations; gross waste of funds; gross mismanagement; abuse of authority; and substantial and specific danger to public health and safety.

The **Public Interest Disclosure and Whistleblower Protection Act** created this system to give the Citizens' Representative unique authority to investigate and recommend consequences when allegations of wrongdoing are proven.

While whistleblowing is not often in the public discourse in Newfoundland and Labrador, this is an important legislative scheme. It serves as a deterrent and is an effective tool for reducing abuse, toxic workplace behaviours, waste and mismanagement of funds. OCR continues to employ it and promote it. When we are successful in stopping these practices, good government and the taxpayers of our Province benefit.

Public servants perform a very important role in identifying and reporting wrongdoing in their workplaces that should be corrected in the public interest. They are protected when they use our services, which are free and conducted outside of the political process

I invite anyone who is considering a disclosure in the public interest to contact us to discuss it in confidence.



Bradley J. Moss
Citizens' Representative

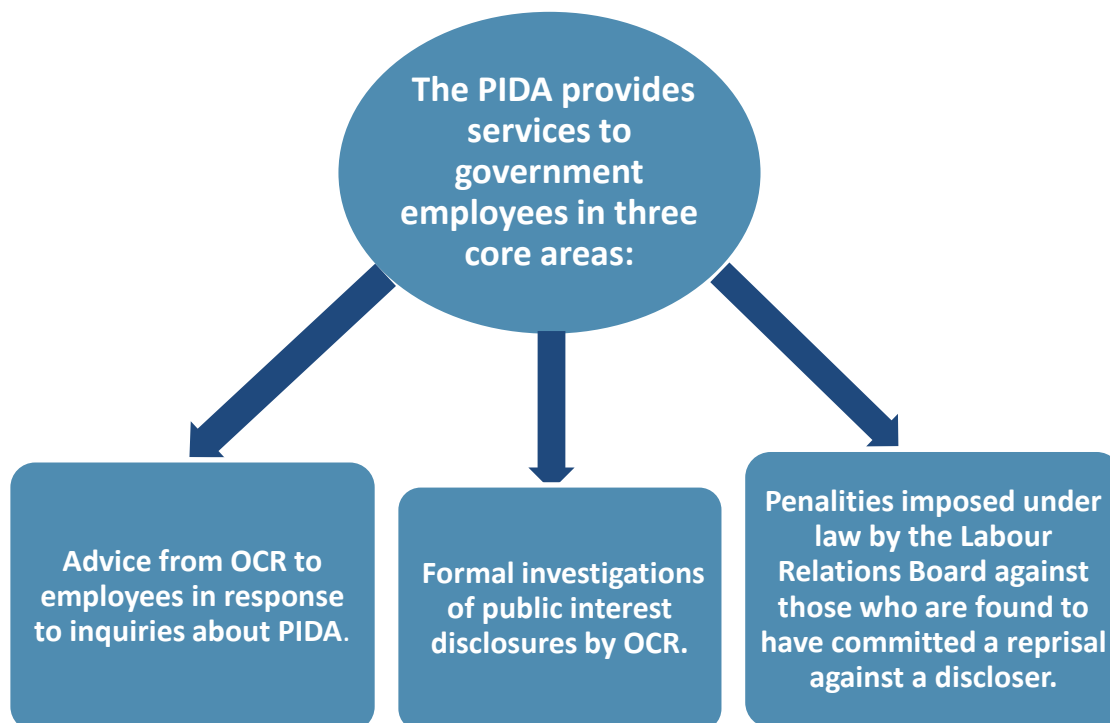
The Public Interest Disclosure and Whistleblower Protection Act

Public service employees have 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.

Since 2014, 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 value of integrity 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. 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.

What is a "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.

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 for a number of reasons from our normal Ombudsman work with the general public who are experiencing difficulties with the public service. Chief among them is the hesitancy to formally engage the process, and the desire for 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.

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.

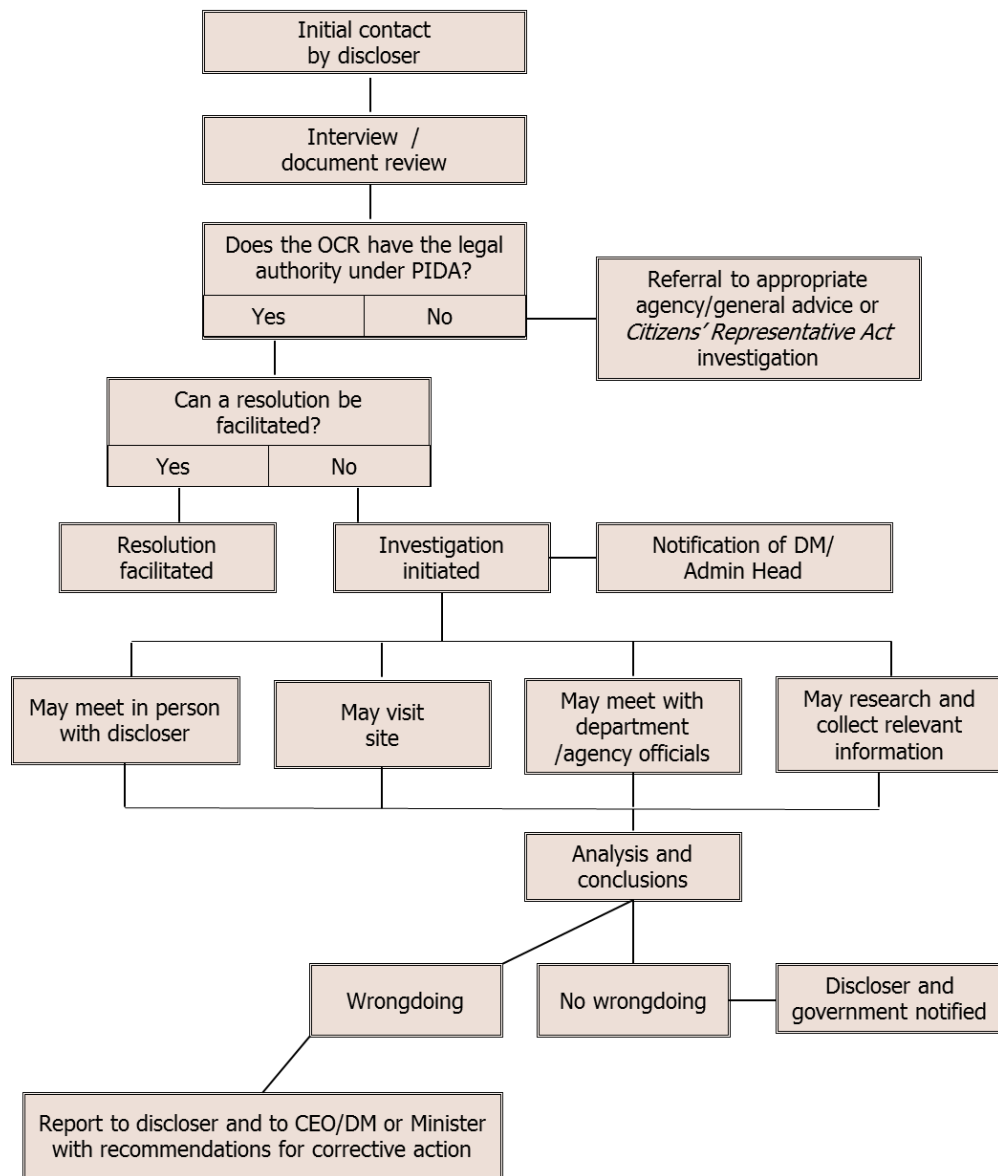
OCR invests the time necessary to thoroughly analyze the evidence, clarify key allegations or probe other areas that may not be covered in the written disclosure.

Disclosures are investigated as informally as possible in a manner similar to investigations taken under the **Citizens’ Representative Act**. Unsolicited written disclosures may not meet the initial test for

wrongdoing under the PIDA, but can still be fully investigated in a confidential manner under our Ombudsman legislation and processes.

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



Update on Investigations

During 2018-19, one formal investigation commenced under the PIDA and remained active at the end of that fiscal year. During the current fiscal year, 2019-20, this investigation was concluded which resulted in findings that did not substantiate the allegations within the disclosure. As a result, there were no findings of wrongdoing emanating from this investigation. The Citizens' Representative reported to the Clerk of the Executive Council on April 29, 2019.

Statistics

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

Results for April 1, 2019 through March 31, 2020, are addressed below in the order that they appear in Section 20.

We considered allegations from ten (10) individuals under the PIDA during 2019 - 20.

TABLE 1 – The PIDA Section 20 Compliance Results

The PIDA Subsection	Results
20(1)(a): Number of inquiries relating to the PIDA.	10
20(1)(b): Number of disclosures received and number acted on and not acted on.	<p>Of the 10 inquiries:-</p> <ul style="list-style-type: none"> ▪ 3 formal written disclosures received; ▪ 2 potential disclosers provided advice; ▪ 0 migrated to formal investigation under the House of Assembly Accountability, Integrity and Administration Act; ▪ 1 migrated to formal investigation under the Citizens' Representative Act; ▪ 0 migrated to formal investigation under the PIDA; ▪ 3 disclosures/potential disclosers did not meet the definition of wrongdoing; ▪ 3 disclosers/potential disclosers were not employees, therefore, not entitled to disclose; ▪ 1 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 2019-2020
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, 2020. These cases have been stripped of identifiers to protect the identity of persons involved.

**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.	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.	<p>Inquiry re: gross mismanagement of public funds.</p> <p>Inquiry re: gross mismanagement.</p> <p>Inquiry re: gross mismanagement.</p> <p>Inquiry re: gross mismanagement.</p> <p>Inquiry re: gross mismanagement.</p> <p>Disclosure re: gross mismanagement.</p>	<p>Disclosure migrated to investigation under the Citizens' Representative Act.</p> <p>Did not meet the definition of wrongdoing.</p> <p>Provision of advice.</p> <p>Discloser no longer an employee of the public service.</p> <p>Anonymous written submission with insufficient information, unresponsive.</p> <p>Did not meet the definition for wrongdoing.</p>

	<p>Disclosure re: gross mismanagement.</p> <p>Inquiry re: gross mismanagement.</p> <p>Inquiry re: gross mismanagement.</p> <p>Disclosure re: gross mismanagement.</p>	<p>Discloser not an employee of the public service.</p> <p>Discloser not an employee of the public service.</p> <p>Provision of advice.</p> <p>Allegations remain under assessment at end of fiscal year.</p>
<p>4(1)(d) knowingly directing or counselling a person to commit a wrongdoing described in paragraph (a), (b) or (c).</p>	<p>N/A</p>	<p>N/A</p>

There were no investigations commenced under the PIDA during the fiscal year 2019-20. We did not investigate where the allegations did not meet the statutory definition of wrongdoing or because there was insufficient information available to support an alleged wrongdoing. Likewise, there were circumstances where citizens who are no longer employees of the public service made disclosures. Under statutory definition, these citizens are not entitled to make a disclosure. One disclosure remained under assessment at the end of the 2019-20 fiscal year.

In each of these situations, disclosers were provided with advice in relation to the managing and appropriate outlet for their allegations. Where appropriate, citizens were invited to consider the filing of a complaint under the **Citizens' Representative Act**.



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