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OFFICE OF THE CITIZENS' REPRESENTATIVE

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

APRIL 1, 2015 – MARCH 31, 2016

JULY 20, 2016



Office of the Citizens' Representative
Province of Newfoundland and Labrador

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July 20, 2016

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 2015-16 fiscal year.

Respectfully submitted,

Barry Fleming, Q.C.
Citizens' Representative

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Citizens' Representative's Message

March 31, 2016 marked the first full year that the Office of the Citizens' Representative (the "OCR") has been the lead investigator for receiving and investigating public interest disclosure (whistleblowing) complaints under the *Public Interest and Whistleblower Protection Act* (the Act " "). The legislation was introduced on July 1, 2014 and from that date to March 31, 2015 we received 19 inquiries from public employees seeking general information or advice under the program established by the Act.

During 2015-16 we received 16 inquiries from public employees about various aspects of the whistleblowing program. More significantly, we concluded three full investigations. These entailed significant contact with whistleblowers, extensive review of documentary evidence and considerable consultation with public entity officials. While two of the investigations did not result in a substantiation of the whistleblowers' allegations, our investigations and close contact with the whistleblowers allayed their concerns. A third investigation resulted in the preparation of a draft report which was not finalized because the public body accepted and implemented our proposed recommendations. We are under strict legislative requirements to keep confidential the details of the work we conduct under this program. We have, however, attempted to give readers a general synopsis of the inquiries and investigations we undertook later in this report.

In last year's message I indicated that two conditions were necessary to ensure that the legislation was fully functioning; a commitment from members of the senior executive of all public bodies that there is value in the program and that the OCR will have full cooperation when conducting investigations; and an ongoing effort to make key facets of the whistleblowing program known and understood by all public bodies. I am pleased to report that during all our work over the past year we received full, forthright and insightful cooperation from the senior executive of the line departments and public bodies we contacted.

Our ongoing commitment to conduct outreach to public employees to explain their rights and responsibilities under the whistleblowing program is challenging. The Province's Public Service is expecting to weather considerable change as a result of a significant budget shortfall. With the inherent uncertainties associated with fiscal restraint, many public employees may not be inclined to marshal the courage and energy to complain about a perceived breach of the Act. We have to be acutely aware of this environment as we present the program throughout the Public Service.

I am pleased with the work of the OCR over the past year in conducting its mandate under the Act. I would like to acknowledge the work of all our staff in this regard. We look forward to the opportunity of assisting public employees in exposing gross mismanagement and other wrongdoings in the year ahead.

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

The PIDA provides employees of the public service with a confidential program to bring forward allegations they believe should be investigated and corrected in the public interest, with penalties for those who commit reprisals against disclosers. These investigations are frequently conducted by ombudsman and commissioners of various jurisdictions across Canada, including the federal government.

Disclosures can be made despite any rule that normally prohibits dissemination of information gained through employment with the Government of Newfoundland and Labrador. Due to their access to inside information, Government 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 Office of the Citizens' Representative (“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 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. Periodically, they have questions about the legal protections afforded by PIDA, the mechanics of the investigative process, or what other options exist to address their concerns.

The process of answering inquiries and providing advice under PIDA is not a brief conversation. 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.

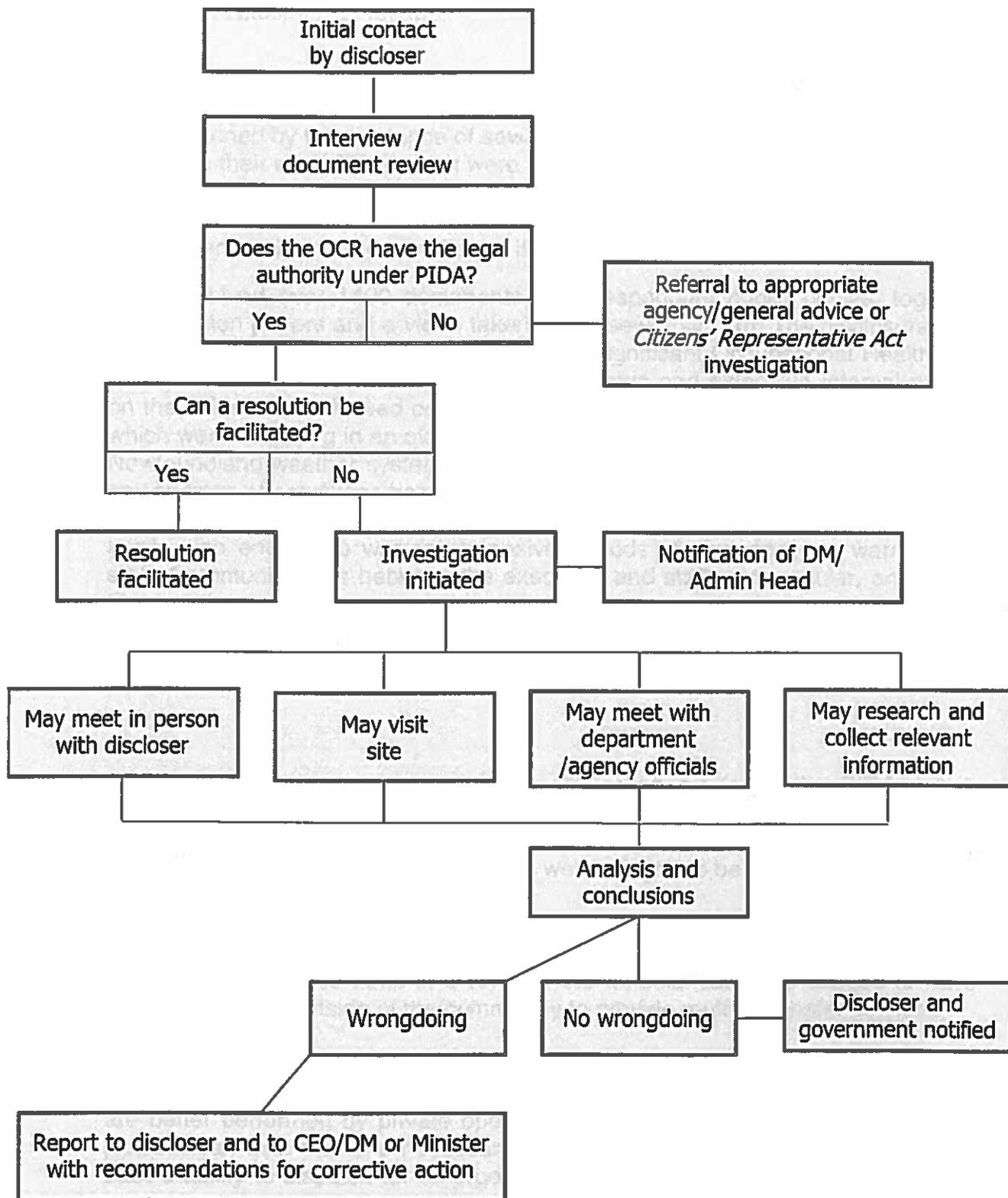
Public Interest Disclosures

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, but may arrive in writing on its own. OCR analyzes the form and the accompanying evidence. 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 utilizing investigative and secrecy provisions of 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 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 2014-15 report indicated it had undertaken two investigations under the PIDA, based on disclosures made by government employees. These matters were thoroughly investigated with outcomes as follows:

1. OCR was notified of health concerns reported by employees of a public body that felt threatened by the existence of sewage-like fumes emanating from a plumbing system in their workplace, which were feared to contain pathogens and allergens that pose a significant threat to human health. It was alleged that senior officials had been continuously aware of the problem; however, no reasonable steps had been taken to eliminate or ameliorate it.

OCR received over 1400 documents from respondent public bodies, together with position papers and a video taken of the sewer system. The disclosure was thorough, chronological, and also contained significant Occupational Health and Safety documentation, consultant reports, photos and extensive internal emails on the subject that showed consistent attention was being paid to the problems, which were occurring in an old building subject to the vagaries of its location, and Newfoundland weather systems. Extensive air quality test results did not lead to any findings of conditions hazardous to human health. There had been extensive mould abatement work done in the workplace, but at no point were exposure levels high enough to warrant extensive periods of shut down or warnings to staff. Communications between the executive and staff were regular, and clear. The building continues to be monitored closely.

There were no acts or omissions that created a substantial and specific danger to the life, health or safety of persons as anticipated by Section 4(1)(a) of the PIDA.

2. OCR investigated an alleged violation of Section 4(1)(c) of the PIDA, which anticipates a gross mismanagement of public funds or a public asset. Specifically, allegations of a gross mismanagement of funds in the road ambulance network, where cost savings were alleged to be readily available.

The issue revolved around administration of policies relating to emergency responses versus inter-facility transfers, and the use of hospital-based versus private ambulance services in a town where ambulances were alleged to have been called from outside of the community to provide routine transfer services.

The public body countered that it needed ambulances at the base at issue for emergency (Code 3) calls. Patient transfers (Code 2) can be time consuming and are better performed by private operators, whose costs vary by the size of the job, but can take the time necessary for Code 2s while preserving the hospital base's ability to dispatch for emergencies. Costing was provided that showed in

the case considered, the public interest is being served. OCR was advised of a review of dispatch services that will see further economical efficiencies realized.

There were no findings of gross mismanagement of public funds as anticipated by Section 4(1)(c) of the PIDA.

3. A third investigation was conducted during 2015-16, involving allegations of gross mismanagement, via inattention to serious allegations about a program funded by government and administered out of a public building. Within days of first contact by the discloser(s) it was determined a bona fide problem existed within the agency concerned. Extensive questioning of public officials and representatives of community groups ensued, together with a review of voluminous documentation over several months. The evidence lead toward a preliminary finding of wrongdoing and the agency was advised of OCR's opinion in a draft report. It recognized fully the problems experienced in the program were not in the public interest, and evidence showed it had struggled internally with how best to deal with the problem as there were numerous obstacles to satisfactory resolution, not the least of which was those administering the service were not public employees. In response, the agency exercised its legal option to recover the building and re-branded the program, ending its relationship with the group that had delivered the services. The investigation was terminated after consultation with the discloser(s) and a series of communications with the agency that satisfied OCR's concern that the matter had to be rectified in the public interest.

Statistics

Section 20(1) of PIDA requires specific reporting by the Citizens' Representative in six areas of activity. Results for April 1, 2015 through March 31, 2016 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	16
20(1)(b): Number of disclosures received and number acted on and not acted on	<p>Of 16 inquiries, 4 formal written disclosures received.</p> <p>3 acted on under PIDA.</p> <p>1 under analysis as of 31 March 2016.</p> <p>0 acted on under <i>Citizens' Representative Act</i>.</p> <p>0 not acted on.</p>
20(1)(c): Number of investigations commenced under PIDA	3
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 OCR under PIDA, and relays the status and/or disposition of each matter as of March 31, 2016. Each has been anonymized to protect the identity of persons involved.

TABLE 2 – Inquiries and disclosures received (April 1, 2015 – March 31 2016)

PIDA Subsection	Inquiry / Disclosure	Status / Disposition
<p>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.</p>	<p>Alleged theft of supplies.</p>	<p>Provision of advice. Discloser advised matter had already been brought to the attention of responsible department and was being investigated internally.</p>
	<p>Unspecified criminal activity.</p>	<p>General inquiry. Discloser would not provide details, location or identity. Provision of advice including instructions to alert local law enforcement or re-establish contact with OCR. No further contact.</p>
	<p>Employee with command and control of a government vehicle reporting to work possibly impaired by alcohol.</p>	<p>Incident reported to have taken place ten days previous. Provision of advice including monitoring of employee, notification of local management in future incidents in the workplace as soon as detected, and immediate notification of local law enforcement if employee has command/control of any vehicle. Investigation of alleged incident refused under Section 15(1)(c) due to passage of time.</p>

<p>4(1)(c) gross mismanagement, including of public funds or a public asset. (Continued)</p>	<p>Gross mismanagement of a government program in conflict with goals of legislation.</p> <p>Gross mismanagement of public funds.</p> <p>Gross mismanagement of a human resource issue / investigation.</p> <p>Gross mismanagement of a human resource issue.</p> <p>Gross mismanagement of a division of government.</p>	<p>Under investigation as of 31 March 2015.</p> <p>Non-jurisdictional. Subject is not a public body subject to the PIDA or OCR oversight. Department providing annual funding toward operations advised privately of allegations for enhanced scrutiny of allocated public funds in the future.</p> <p>Advice provided. Allegations as stated do not meet threshold test for investigation under PIDA. Discloser encouraged to file a complaint under the <i>Citizens' Representative Act</i>.</p> <p>Discloser considering resigning from the public service due to employment dispute and inquiring about options under PIDA. Advice/information provided on PIDA program, statutory limitations, and professional backgrounds of OCR investigators.</p> <p>Advice provided. Matter is jurisdictional however discloser elected to wait on</p>
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<p>4(1)(c) gross mismanagement, including of public funds or a public asset. (Continued)</p>	<p>Gross mismanagement, via inattention to serious allegations about a program funded by government and administered out of a public building.</p> <p>Gross mismanagement of public funds.</p> <p>Gross mismanagement via inattention to allegations of employee not reporting for work.</p>	<p>filing written disclosure. No written disclosure received as of 31 March 2016.</p> <p>Investigated and reported (see page 11).</p> <p>Advice provided. Allegations as stated do not meet threshold test for investigation under PIDA. Discloser encouraged to file a complaint under the <i>Citizens' Representative Act</i>.</p> <p>Declined. Discloser not a government employee, and would not identify employee at issue. Advised as a private citizen he/she could report alleged behaviours directly to DM/ADM, or have an employee with proximal knowledge contact OCR.</p>
<p>4(1)(d) knowingly directing or counselling a person to commit a wrongdoing described in paragraphs (a)(b) or (c).</p>	<p>Directing an official to commit an act known to be in conflict with legislative / regulatory requirements.</p>	<p>Under investigation as part of a 4(1)(c) file.</p>