



**OFFICE OF THE CITIZENS' REPRESENTATIVE**

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

**APRIL 1, 2017 – MARCH 31, 2018**

**June 15, 2018**



**Office of the Citizens' Representative**

Province of Newfoundland and Labrador

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June 15, 2018

The Honourable Perry Trimper, 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 2017-18 Fiscal Year.

Yours truly,

**Barry Fleming, Q.C.**  
Citizens' Representative

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## **Citizens' Representative's Message**

We are proud to have responsibility for both the whistleblowing program within the House of Assembly and the program available to all employees of the broader public service. These programs provide employees to confidentially contact us when they witness what may be wrongdoing in their workplaces. There are two unique aspects about this work which differentiates it from our primary ombudsman responsibilities.

The first aspect emanates from the amount of time and human resources to satisfactorily deal with employees who seek advice. We spend as much time as necessary in explaining options available to address their concerns. If a whistleblower complaint is warranted, we will examine all available evidence to draft an investigation plan. We will ensure that the employee is aware of what to expect as the process unfolds. Our singular goal at this stage is to ensure the employee is comfortable with the process.

The second unique aspect of the whistleblowing programs is the challenge of balancing the need for open and transparent reporting with the legislative mandate to keep our work confidential. Historically, whistleblowing programs were designed by large public and private organizations to identify that which could threaten the viability and reputation of these organizations, and to expeditiously deal with it. In many respects, public reporting on this activity was contraindicated to its function. We have canvassed how other public whistleblower investigators throughout Canada report on their activities and the content of this report emulates their best practices.

I encourage all employees of the House of Assembly and the Public Service, and indeed, all citizens, to contact us if they have questions about this important work.

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

Members of the public service have a crucial role to play in keeping their workplaces safe and respectful for themselves, and free from gross mismanagement on behalf of the public. Proclaimed in 2014, the PIDA authorizes employees of the public service to come forward in a confidential fashion with allegations of specific wrongdoing they believe should be investigated and possibly corrected in the public interest. Disclosures can be made despite any rule that normally prohibits dissemination of information gained through their employment with the Government of Newfoundland and Labrador.

PIDA contains 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 the Office of the Citizens’ Representative (the “OCR”), or falsifying or destroying documents can also result in fines of up to \$10,000.

The Office of the Citizens’ Representative (the “OCR”) has a host of information on the whistleblower program under the “Whistleblowers” tab on its website [www.citizensrep.nl.ca](http://www.citizensrep.nl.ca). Interested persons can contact our office in confidence at (709) 729-7647 or 1-800-559-0079.

### **Services Provided by the PIDA**

PIDA provides services to government employees in three core areas:

- (1) Advice to employees in response to inquiries about PIDA from the OCR;
- (2) Formal investigations of public interest disclosures by the OCR; and,
- (3) Sanctions imposed under law by the Labour Relations Board against those who are found to have committed a reprisal against a discloser.

### **Departments and Public Bodies covered by the PIDA**

“Departments” are defined at Section 2(e) 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 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 currently exempt from PIDA.

## **What is a “Wrongdoing”?**

Wrongdoing is defined in Section 4(1) of 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).

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

## **What is “Gross Mismanagement?”**

PIDA does not specifically define gross mismanagement. The OCR takes a flexible approach when assessing potential disclosures under the lens of gross mismanagement. 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.

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. However the Citizens’ Representative will frequently consider investigating the matter on his own via Section 15 of the *Citizens’ Representative Act*, without a named individual. The resulting “Ombudsman” investigation may go on to identify misconduct; identify other avenues for redress; and make recommendations for systemic change.

### **What is a “Reprisal”?**

Reprisals fall within the legal mandate of the Newfoundland and Labrador Labour Relations Board. Under 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 defined 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.

## **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.” 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 in Section 20. There are times when employees suspect wrongdoing, but are unsure about whether a decision or action in their workplace actually qualifies as a “wrongdoing” under PIDA. In some cases, employees are looking for information about:

- the blanket legal protections afforded by PIDA;
- protections against the disclosure of their identity;
- how the investigative process works; or,
- what else they can do to possibly resolve their concerns. In some cases, there are already processes that are underway, or that may be stalled, or recently concluded.

The process of answering inquiries and providing advice under PIDA differs in some ways from our normal Ombudsman work. There are generally more meetings, telephone calls, and evidentiary reviews required in the initial phase of the PIDA process. Many who contact our office wish to remain anonymous, or make contact through anonymous email accounts until they are more comfortable with the process.

The inquiry process may also require the employee to gather additional evidence of wrongdoing, or provide other information requested by us 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, extended periods of personal reflection are required between the provision of advice and writing a formal disclosure to us for analysis.

## **Public Interest Disclosures**

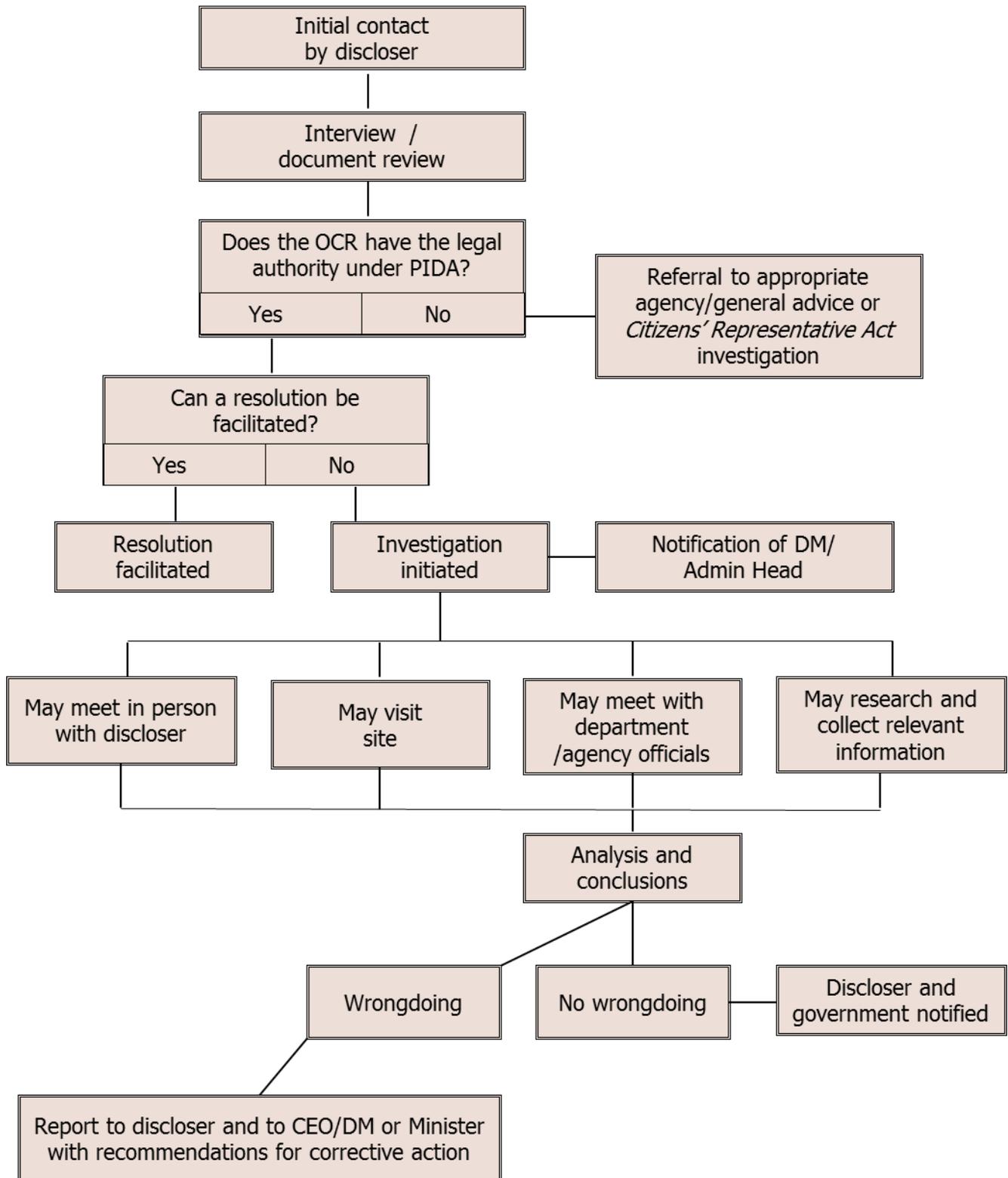
Public interest disclosures are required to be in writing pursuant to Section 8 of the Act. A written disclosure usually follows a period of inquiry, as previously described. We will then analyze the form and the accompanying evidence / investigator’s notes against a series of criteria used to determine our jurisdiction to handle the matter. The employee may be contacted by us to clarify the disclosure and, if necessary, establish timeframes

or identities of subjects named in the disclosure, or probe other areas that may not be covered in the disclosure.

Disclosures are investigated as informally as possible in a manner similar to investigations taken under the *Citizens' Representative Act*. As outlined earlier, 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**

Our 2016-17 PIDA report indicated we were analyzing a disclosure made by a government employee who alleged gross mismanagement of a human resource issue, and reprisals in relation to an employee contract pursuant to Section 4(1)(c) of PIDA.

During 2017-18 this matter was monitored by us through contact with the employee; however, the direction of the complaint changed when the parties began exchanging emails directly and the public body hired external legal counsel. We discontinued monitoring the situation when the discussions between the parties migrated toward a complex civil litigation. The employee was advised to seek private legal counsel.

## **Statistics**

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

Results for April 1, 2017 through March 31, 2018 are addressed below in the order that they appear in Section 20.

We considered allegations from sixteen (16) individuals under PIDA during 2017-18.

**TABLE 1 – PIDA Section 20 Compliance Results**

<b>PIDA Subsection</b>	<b>Results</b>
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, 9 formal written disclosures received.</p> <p>7 potential disclosers provided advice.</p> <p>Of 16 inquiries, 11 migrated to formal investigations under the <i>Citizens' Representative Act</i>.</p> <p>4 received advice with no further action by OCR.</p> <p>1 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.	0 during FY 2017-18.
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 PIDA, relaying the status and/or disposition of each matter as of March 31, 2018. Each has been anonymized to protect the identity of persons involved.

**TABLE 2 – Inquiries and disclosures received  
(April 1, 2017 – March 31 2018)**

<b><i>PIDA Subsection</i></b>	<b><i>Inquiry / Disclosure</i></b>	<b><i>Status / Disposition</i></b>
<i>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.</i>	Disclosure re: Act or omission constituting an offence under the <i>Conflict of Interest Act</i> or a regulation thereunder.	No specific offence provisions contained in the <i>Conflict of Interest Act</i> or a regulation thereunder. PID file closed.
<i>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.</i>	N/A	N/A
<i>4(1)(c) gross mismanagement, including of public funds or a public asset.</i>	Disclosure re: gross mismanagement of a public body re: human resource issues.	Matter currently under investigation pursuant to the <i>Citizens' Representative Act</i> .

<p>(1)(c) <i>gross mismanagement, including of public funds or a public asset.</i> (cont'd)</p>	<p>Inquiry re: gross mismanagement of a public body re: human resource issues.</p> <p>Disclosure re: gross mismanagement of a public body re: human resource issues.</p> <p>Inquiry re: abuse of travel status and questionable approval and timing of travel.</p> <p>Disclosure re: gross mismanagement of a public body re: human resource issues.</p> <p>Disclosure re: gross mismanagement of a public body re: human resource issues.</p> <p>Inquiry re: gross mismanagement of a human resource issue, and reprisals in relation to an employee contract</p> <p>Disclosure re: gross mismanagement of a public body re: human resource issues.</p>	<p>Matter currently under investigation pursuant to the <i>Citizens' Representative Act</i>.</p> <p>Matter currently under investigation pursuant to the <i>Citizens' Representative Act</i>.</p> <p>Provision of advice.</p> <p>Matter currently under investigation pursuant to the <i>Citizens' Representative Act</i>.</p> <p>Matter currently under investigation pursuant to the <i>Citizens' Representative Act</i>.</p> <p>Parties retaining counsel and contemplating litigation. File closed during FY.</p> <p>Matter currently under investigation pursuant to the <i>Citizens' Representative Act</i>.</p>
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<p><i>(1)(c) gross mismanagement, including of public funds or a public asset. (cont'd)</i></p>	<p>Inquiry re: gross mismanagement of a public body re: human resource issues.</p> <p>Inquiry re: gross mismanagement of a public body re: human resource issues.</p> <p>Disclosure re: gross mismanagement of a public body re: human resource issues.</p> <p>Inquiry re: gross mismanagement of a public body re: human resource issues.</p> <p>Inquiry re: gross mismanagement of a public body re: human resource issues.</p> <p>Disclosure re: gross mismanagement of a public body re: human resource issues.</p> <p>Inquiry re: private company abusing a government program and incorrectly reporting information to a public body re: public funds.</p>	<p>Matter currently under investigation pursuant to the <i>Citizens' Representative Act</i>.</p> <p>Matter currently under investigation pursuant to the <i>Citizens' Representative Act</i>.</p> <p>Matter currently under investigation pursuant to the <i>Citizens' Representative Act</i>.</p> <p>Matter currently under investigation pursuant to the <i>Citizens' Representative Act</i>.</p> <p>Matter currently under investigation pursuant to the <i>Citizens' Representative Act</i>.</p> <p>Matter currently under investigation pursuant to the <i>Citizens' Representative Act</i>.</p> <p>Provision of advice. Relevant information taken and transferred with consent to public body for investigation and follow up.</p>
<p><i>4(1)(d) knowingly directing or counselling a person to commit a wrongdoing described in paragraphs (a)(b) or (c).</i></p>	<p>N/A</p>	<p>N/A</p>

**Contact Information:**

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