



OFFICE OF THE CITIZENS' REPRESENTATIVE
Province of Newfoundland and Labrador

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

APRIL 1, 2018 – MARCH 31, 2019

July 15, 2019



Office of the Citizens' Representative

Province of Newfoundland and Labrador

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July 15, 2019

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 2018-19 Fiscal Year.

Yours truly,

Bradley J. Moss
Citizens' Representative

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Citizens' Representative's Message

When the House of Assembly passed the **Public Interest Disclosure and Whistleblower Protection Act** in 2014, it gave government employees an avenue to confidentially disclose suspected wrongdoing in their workplace. In my view, this legislation represents a commitment to excellence in public service by setting high expectations of personal conduct, and imposing sanctions against those who deviate from it.

Since the law came into effect, the Office of the Citizens' Representative has liaised on a regular basis with employees who are either seeking confidential advice, investigating their options, inquiring about protections, or are ready to formally disclose in the public interest. It is important for all government employees to know that regardless of what type of interaction they have with our Office, they are doing the right thing.

In 2019 our province faces a number of economic and demographic challenges that dominate our public discourse. Now, more than ever, the citizens of Newfoundland and Labrador take a dim view of wrongdoing, especially gross mismanagement of public funds and of government assets. In a similar vein, the overwhelming majority of our public service employees support the principles of good governance. They recognize the essential public trust placed in them, and they advocate daily for the proper deployment of public resources. But, coming forward to report internal problems in the public interest often comes with a dilemma of whether or not it is in their personal interest to do so. Whether you have noticed potential wrongdoing by someone you have worked with for thirty years, or if you work in a government office in a small location with only few staff and fear being identified, that dilemma is real every time.

However, the dilemma should never prevent someone from contacting us in confidence to seek advice. That contact will not trigger an automatic investigation. In many cases we talk about procedure and answer general questions long before we even know what the allegations are, or who, or where they are coming from. There are often ways to quickly solve the problem without the intrusiveness and weighty allegations a public interest disclosure investigation often brings with it. Remember - our services are free; we work hard to protect your identity; reprisals are illegal; and our investigators are always available to confidentially discuss your dilemma.

This report covers the fiscal year ending March 31, 2019. At all times material to this report, my predecessor, Barry Fleming, QC, was the Citizens' Representative. I want to thank Barry for the enormous amount of work he did implementing and promoting this program, and for his respectful, exemplary management of the public interest disclosures he was responsible for investigating during his time here.

Bradley J. Moss
Citizens' Representative

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

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.

Passed in 2014, the PIDA authorizes 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 PIDA, and can result in personal fines of up to \$10,000.

The PIDA provides services to government employees in three core areas:

- (1) Advice from the OCR to employees in response to inquiries about the PIDA;
- (2) Formal investigations of public interest disclosures by the OCR; and
- (3) Penalties 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 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 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.

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

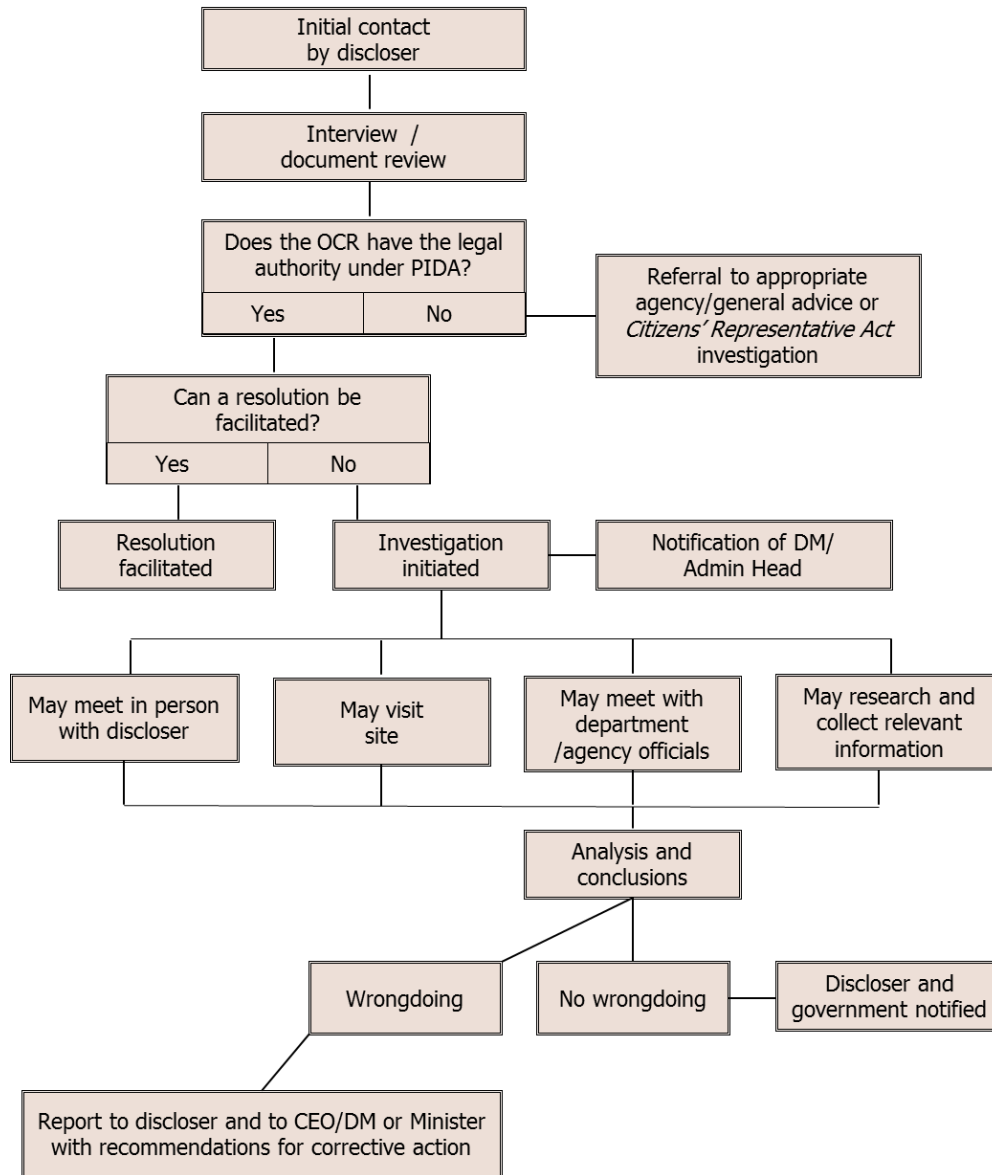
Public interest disclosures are required to be in writing pursuant to Section 8 of the PIDA. A written disclosure usually follows a period of inquiry, as previously described. In some cases the completed forms and evidence arrives in a package, or via a solicitor.

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 another was referred for investigation under the **House of Assembly Accountability, Integrity and Administration Act**. At the end of fiscal year 2018-19, both investigations remained open. Therefore, any outcomes will be reported in the 2019-20 fiscal year.

Statistics

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

Results for April 1, 2018 through March 31, 2019, are addressed below in the order that they appear in Section 20.

We considered allegations from seven (6) individuals under the PIDA during 2018 -19.

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, 2 formal written disclosures received.</p> <p>4 potential disclosers provided advice.</p> <p>Of 6 inquiries, 1 migrated to formal investigation under the House of Assembly Accountability, Integrity and Administration Act.</p> <p>Of 6 inquiries, 1 migrated to formal investigation under the Citizens' Representative Act.</p> <p>Of 6 inquiries, 1 migrated to formal investigation under the PIDA.</p>

20(1)(c): Number of investigations commenced under PIDA.	1 investigation 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 2018-2019
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, 2019. These cases have been stripped of identifiers to protect the identity of persons involved.

**TABLE 2 – Inquiries and Disclosures Received
(April 1, 2018 – March 31, 2019)**

<i>PIDA Subsection</i>	<i>Inquiry / Disclosure</i>	<i>Status / Disposition</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.	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.</p> <p>Inquiry re: gross mismanagement of a public asset.</p> <p>Disclosure re: gross mismanagement of public funds.</p>	<p>Provision of advice.</p> <p>Provision of advice.</p> <p>Disclosure migrated to investigation under the House of Assembly Accountability, Integrity and Administration Act.</p>

	<p>Disclosure re: gross mismanagement of public funds.</p> <p>Inquiry re: gross mismanagement.</p> <p>Inquiry re: gross mismanagement.</p>	<p>Matter currently under PIDA investigation.</p> <p>Provision of advice.</p> <p>Provision of advice. Disclosure migrated to investigation under the Citizens' Representative Act.</p>
<p>4(1)(d) knowingly directing or counselling a person to commit a wrongdoing described in paragraph (a), (b) or (c).</p>	<p>Disclosure re: directing an act constituting an offence under an Act of the Legislature.</p> <p>Disclosure re: directing an act constituting an offence under an Act of the Legislature.</p>	<p>Matter currently under investigation.</p> <p>Disclosure migrated to investigation under the House of Assembly Accountability, Integrity and Administration Act.</p>

Contact Information:

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