

What's Wrong with the Public Servants Disclosure Protection Act

An analysis of the *Public Servants Disclosure Protection Act* (C-11) as amended by the *Federal Accountability Act* (C-2).

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About FAIR

FAIR (Federal Accountability Initiative for Reform) promotes integrity and accountability within government by empowering employees to speak out without fear of reprisal when they encounter wrongdoing. Our aim is to support legislation and management practices that will provide effective protection for whistleblowers and hence occupational free speech in the workplace. FAIR is a registered Canadian Charity.

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Executive Summary

In November 2005, The Public Servants Disclosure Protection Act (PSDPA) – an act claiming to provide protection to federal public servants – was passed by Parliament. In fact the PSDPA was deeply flawed and during the election campaign that followed, the Conservatives highlighted some of the shortcomings and promised six specific improvements. The amendments that were supposed to deliver these improvements are included in the Federal Accountability Act (FAA).

Proponents of the FAA have repeatedly claimed that, with these new amendments, the PSDPA now provides ‘ironclad’ protection for whistleblowers. Based on this claim, many public employees and employees of government subcontractors may believe that they can now speak up about wrongdoings in their departments without having to expose themselves to career-ending reprisals.

FAIR has conducted in-depth analyses of the whistleblower legislation at each stage in the process, has testified before both Commons and Senate committees, and has analyzed all proposed amendments. We believe that no other independent organization has gained as much insight into what this law does and does not do for whistleblowers (and for the public).

Regrettably, our conclusion is that the claim of ‘ironclad’ protection is overstated and even misleading. Although the Act erects an impressive structure of new (and costly) appointments and procedures, it does little to protect whistleblowers or the public. For example:

- 1) It establishes an internal administrative process that forces whistleblowers to place their fate exclusively in the hands of a newly-created Commissioner, and denies them access to our normal system of public courts.
- 2) It provides only token legal support for any truth-teller who steps forward to protect the public interest, and who is likely as a result to face retaliation orchestrated by the wrongdoers.
- 3) It provides no assurance that any wrongdoing reported by a whistleblower will be corrected: it merely calls for investigation and reporting by the Commissioner, who has no powers to order corrective action or to prosecute lawbreakers. This omission defeats the whole purpose of truth-tellers coming forward.

Public servants who are considering making a disclosure under the new legislation should first pause and make sure that they *fully* understand how it works, before they entrust their fate to this deeply flawed process.

Introduction

Perhaps your boss is pressuring you to omit important information from your reports, to sanitize your audit findings, to approve transactions that break the rules, or just to turn a blind eye and pretend that certain common practices aren't happening. Perhaps these wrongdoings are mainly about misuse of public money, or perhaps they are about issues that could affect the lives of many Canadians such as tainted food or water, contaminated drugs, or leaking nuclear reactors.

Your predicament is that you want to speak out – to protect the public interest and for your own personal sanity and self-respect – but you are not sure how to go about this, and whether there might be negative repercussions for you.

You need to understand that drawing attention to truths that are inconvenient to those in power is inherently dangerous and can cause serious harm to you career, your family's wellbeing, even to your physical and mental health.

This has been the universal experience of other whistleblowers: they nearly always find themselves facing management denial of the problem, and retaliation designed to silence and discredit them. So, before doing anything, you must arm yourself with information, for example: about the experiences of others; about the relevant legislation that may apply in your situation; about the likelihood of obtaining legal support (e.g. from your union) in the upcoming battle; and so on.

The FAIR website (fairwhistleblower.ca) provides information relevant to Canadians, and links to other valuable resources. You should read this advisory alongside two other FAIR publications: *The Act in Plain English*, which summarizes the main processes created by the new legislation; and the *Consolidated Text of the Public Servants Disclosure Protection Act*, which consolidates into one document the original bill and the dozens of subsequent amendments that were included in the FAA.

The Key Questions

The Public Servants Disclosure Protection Act is complex legislation and some of the most serious challenges facing the whistleblower are quite technical in nature. Our approach here is to explore some of the key questions that, as a potential whistleblower, you need to ask, in order to weigh your chances of success.

We will define success as:

Exposing wrongdoing and seeing it corrected, without incurring serious harm to your career, your health, or your loved ones.

The following are the some of the most pertinent and important questions.

Can I be sure that the Commissioner will investigate my allegations?

The Commissioner can only investigate if the actions that you disclose fit the definition of wrongdoing (Section 8). However, the definition in the Act is problematic because of

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what it omits. For example, Treasury Board Policies (e.g. the procurement rules that were at the heart of the Sponsorship Scandal) are *not* specifically included, although these are among the principal instruments used for management and control in the public service.

If you have witnessed violations of Treasury Board Policies (or other Departmental rules), your disclosure may not be accepted. The Commissioner will have to decide whether the wrongdoing falls under one of the broader categories given in the definition of wrongdoing, such as 'gross mismanagement' – and the government lawyers who will defend the alleged wrongdoer can subsequently challenge this decision.

Even if this definition of wrongdoing is met, the Commissioner is not obliged to investigate. The Commissioner can refuse to deal with any disclosure (Sections 23, 24), e.g. if the Commissioner believes that the whistleblower is not acting 'in good faith'; or it is 'not in the public interest'; or any other 'valid reason'.

These vague and subjective provisions give the Commissioner wide discretion to do nothing. So there is no guarantee that your disclosure will be investigated, regardless of the nature or severity of the alleged wrongdoing: it's up to the Commissioner to decide whether the wrongdoing falls within the statutory definition, and whether your motives for coming forward are 'pure'.

If the Commissioner decides to investigate, who is told about this?

The only person that *must* be informed if the Commissioner decides to launch an investigation is the head of the department concerned (typically the Deputy Minister), who must also be told the substance of the allegations. The Commissioner is also allowed to inform those accused of wrongdoing. The Commissioner is not however required to inform anyone else, such as the Minister responsible.

In summary: the only people who are certain to learn about your allegations are the head of your own department and those who are questioned during the investigation (including the alleged wrongdoers). Based on the experience of other whistleblowers, you will now face two serious risks: 1) the organization may commence a cover-up, aimed at suppressing the truth rather than correcting the problem; and, 2) you may become the target of a campaign of retaliation.

You should therefore examine carefully the adequacy of the provisions in this Act that are supposed to: 1) ensure corrective action, and 2) protect you from retaliation.

If the investigation proves that there is wrongdoing, will these be corrected and the wrongdoers disciplined?

The Commissioner must report the findings of any investigation to the head of the department concerned. If wrongdoing is found, the Commissioner can make recommendations for action, and a timeframe for the department head to report what actions have been taken.

When wrongdoing is found, the Commissioner must also make a case report to

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Parliament within 60 days. This report includes the finding of wrongdoing, any recommendations made to the department head, and any observations regarding the adequacy of the department's response.

In summary: the Commissioner can bring wrongdoing to the attention of Parliament, but has no power to order corrective action, nor to discipline or prosecute the wrongdoers. This process may seem reasonable, but decades of experience have demonstrated that such powers are not enough to reliably correct serious wrongdoing.

For example, although the public strongly approves of the work of the Auditor General, departments routinely ignore the AG's recommendations year after year, choosing instead to ride out the brief storm of public indignation that follows each report. This was the case with the Sponsorship Scandal, where the AG reported procurement irregularities for years but no effective action was taken. The full truth did not emerge until Prime Minister Paul Martin chose to establish a public inquiry. Although the resulting scandal helped bring down his government, Justice Gomery had no power to discipline or prosecute the wrongdoers, nor to order corrective actions.

Gomery's recommendations for corrective action have still not been implemented (they are largely ignored in the Federal Accountability Act), and only a handful of the many participants in the Sponsorship Scandal have been prosecuted.

This recent but typical example illustrates just how ineffective is the traditional process of simply reporting wrongdoing to Parliament. In order to combat corruption effectively, additional powers are also required: to prosecute wrongdoers and to order corrective action.

As a whistleblower, you should also consider that as long as the wrongdoers remain unpunished and in positions of power, you remain vulnerable to retaliation orchestrated by them, even years later – and as we will see the Commissioner has little ability to protect you from such retaliation.

What power has the Commissioner to protect me from retaliation?

If you know or suspect that you have become a target for retaliation, you can make a *complaint* to the Commissioner, who may choose to investigate.

If the Commissioner agrees to investigate your complaint, a quasi-legal process begins: first another investigation (this time into the alleged retaliation), and then (if the Commissioner so decides) the case may be referred to a new, specially-created Tribunal. The Tribunal has the power to discipline anyone found guilty of retaliation.

At first sight this process may seem promising, but there are some significant problems.

1) The first problem is that you have very little time to realize that you are being retaliated against and to file a complaint – only 60 days from when you knew about the retaliation (or from when the Commissioner considers that you should have known).

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This is far too little time. In practice, whistleblowers often think that they are just going through a rough patch with their current boss and only discover months or years later that the organization has been systematically engaged in a campaign of adverse personnel moves including issuing negative appraisals, denying them promotions, and generally making life difficult for the employee. The Commissioner *can* extend this time limit – but again the law is written in a way that puts you at the mercy of the Commissioner's good will towards your case.

Incidentally, even if the Commissioner has already agreed to investigate your disclosure, he or she may refuse to deal with your complaint of retaliation, for various reasons – again including that subjective test of motive, that your complaint was not made 'in good faith'.

2) The second problem is your *access to legal counsel*. Those accused of retaliation will almost certainly be defended by a team of Justice Department lawyers, with seemingly unlimited time and resources, all paid for by the taxpayer. Unless your union has agreed to defend you (and unions rarely involve themselves in individual cases), you will have to pay for a lawyer. Such legal proceedings are *very* costly, often running into hundreds of thousands of dollars. Moreover, finding good legal counsel familiar with litigating against the government (and willing to do so) is very difficult. Your union may be unwilling or unable to defend you – for example, if the defendant(s) are also union members. If you have no such support, the Commissioner can provide you with access to legal assistance – up to the limit of \$1,500 (or \$3,000 in 'exceptional circumstances').

Yet the Justice Department can and does spend *millions* of dollars on individual whistleblower cases, entangling these in legal manoeuvres for years while the whistleblower's legal costs mount up inexorably. Clearly the token amount of legal support available does nothing to level the playing field.

3) The third and most serious problem is that *the onus is on* you to prove that the adverse actions taken were retaliation for your disclosure. In practice this is often impossible for an employee to prove since bosses engaged in such harrassment generally don't admit to it, and proof is hard to obtain. However, without such proof you have no recourse, no remedy, and *no defence against further retaliation*.

In other more progressive jurisdictions, this frequently fatal blow to whistleblower cases is remediated by a *reverse onus* provision: once the employee has proven that there is a connection between the whistleblowing and the adverse action (e.g. a short time frame between the whistleblowing and a demotion) the burden shifts to the employer to prove that these actions were taken for good reasons other than retaliation.

In summary, the 'protection' that this bill offers is a process laden with pitfalls for the whistleblower, with completely inadequate legal assistance, and a standard of proof (for retaliation) that can rarely be met.

How much will the press and the public learn about what has been going on?

This is an extraordinarily secretive process. The *only* substantive information ever revealed about wrongdoing is the information included in the Commissioner's case report to Parliament. This report may be as extensive or as terse as the Commissioner chooses, but in either case no further information is available to anyone.

The Act very carefully and precisely blocks all possible avenues of access to the details of the Commissioner's investigations, putting these beyond the reach of Access to Information laws not just for a few years, but *forever*. This is one point on which the Commissioner has no discretion.

Government departments and agencies have frequently been criticized for hiding embarrassing information by incorrectly classifying documents e.g. as solicitor/client privilege and/or cabinet confidence. In other jurisdictions, this shield of confidentiality can be penetrated in certain circumstances to allow alleged wrongdoing to be properly investigated. The PSDPA does not do this. Under this Act such classified information cannot ever be disclosed – either by an employee whistleblower or by the Commissioner.

Even the Tribunal that looks into alleged reprisals against the whistleblower may elect to conduct its proceedings *in camera* (i.e. in secret) if either of the parties requests this. The agreement of the other party is not required.

Regardless of what party is in power, it is standard practice for the Government of the day to play down the severity of potentially embarrassing disclosures, and to seek to reassure the public that the problems were minimal and have already been put right. If you feel strongly that the public should learn full details of the wrongdoing that you have uncovered, be aware that once you make a disclosure to the Commissioner you have essentially gagged yourself and handed over to the Commissioner full control over what happens to your information.

A few other common questions

I know about wrongdoing where both government and subcontractor personnel are involved. Can the Commissioner investigate this?

The Commissioner has no power to obtain information from outside the public sector and must abandon any line of investigation that leads outside the public sector (Section 34). Consequently, in any case where subcontractors play a significant role (even unknowingly) the Commissioner's ability to investigate is crippled from the outset.

Given the vast (and increasing) volumes of government work and money that flow through private sector contractors, this is clearly a very serious shortcoming of the Act.

Does this Act help me in any way if I work in the Armed Forces, CSIS or the RCMP?

The Armed Forces and CSIS are excluded from the Act, and the RCMP, although theoretically covered, is for all practical purposes exempted. RCMP employees can submit disclosures to the Commissioner in the normal way, but unlike other public servants they cannot submit complaints of reprisal directly to the Commissioner: they must first exhaust their organization's internal complaints procedures. But the RCMP has a track record of using these internal procedures to punish whistleblowers, and these proceedings can take a very long time. Thus it doubtful whether RCMP employees will have any effective protection and/or remedy under the PSDPA.

I am not a public servant, but I know about wrongdoing in the public service. Can I report this?

One of the claims made for this Act is that it protects all Canadians who may blow the whistle on public service wrongdoing, not just public servants. In reality it does nothing of the sort. Presumably, anyone can make a disclosure to the Commissioner and the Act does provide that employers cannot retaliate against employees who have made a disclosure. But citizens who are not current or former public servants cannot be helped by the Commissioner.

Unless you are a current or former public servant, you will be entirely on your own in trying to seek a remedy from your employer for any reprisals you experience, and without a remedy you have no protection.

Is there any way that I can use our normal court system instead, so that the public can learn the facts, and so that I can seek restitution for any retaliation against me?

No: public servants no longer have the right to sue their employer. They were stripped of this right in 2003 by Section 236 of the Public Service Modernization Act.

Conclusion

Trying to draw attention to wrongdoing is inherently dangerous, and people who have done so in the past have often suffered from relentless reprisals, typically orchestrated by their superiors. Fear of such reprisals silences most potential truth-tellers, who rightly fear for their careers, their livelihood and the potential effect on their families.

This is why there have been so many scandals where *no-one* came forward – even in situations where many people knew what was going on and innocent people were being harmed as a result.

As long as the law does not provide any effective protection for truth-tellers, we cannot blame those who chose to remain silent rather than martyr themselves and their families, especially when there is little chance of bringing about any change.

We hope that this document will help you to determine the best course of action, to protect the public interest without bringing harm upon yourself and your loved ones.

Other Sources of Information

1. **The Public Servants Disclosure Protection Act**

A concise explanation of the main whistleblower provisions of the Federal Accountability Act, written in plain English.

Available on the FAIR website: see 'Canadian Legislation'

2. **Courage Without Martyrdom**

The Whistleblower's Survival Guide, by Tom Devine, GAP Legal Director.

Available on the FAIR website: see 'Self Help Resources'