

## **The Public Servants Disclosure Protection Act Explained**

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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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# The Public Servants Disclosure Protection Act Explained

This document explains in plain English the main whistleblower provisions of the *Public Servants Disclosure Protection Act* (Bill C-11), as amended by the *Federal Accountability Act* (Bill C-2). It is a work in process, and will be updated as our detailed analysis of the Act continues, and it is best studied alongside the consolidated text of the Act, also available from FAIR. The latest versions of both these documents can be found on the FAIR website at: <http://fairwhistleblower.ca>

This is not a legal document and we can take no responsibility for any errors. We would be grateful for any comments regarding omissions and/or errors.

## Background

The Federal Accountability Act (Bill C-2) modifies the original whistleblower legislation (Bill-C11) that was passed during the previous session of Parliament. In this document, references to ‘the Act’ mean the final legislation (i.e. both bills combined). The Act contains numerous special cases and exceptions: for the most part these are not covered here.

## Participants

The Act identifies various participants in the procedures set out, including:

- A new *Public Sector Integrity Commissioner* who investigates allegations of wrongdoing (called *disclosures*) as well as claims of retaliation against whistleblowers (called *complaints*).
- A special-purpose administrative board (the *Tribunal*) comprising judges appointed by the Prime Minister that examines complaints of retaliation referred to it by the Commissioner.
- The chief executive (normally the Deputy Minister) of any department under investigation as a result of a disclosure.
- The person who makes the disclosure (i.e. the whistleblower); the alleged wrongdoer(s); and anyone suspected of retaliation against the whistleblower.

## Scope

The Act applies to wrongdoing within most parts of the Federal public service. Notable exclusions are the Canadian Forces, and the Security Agencies (CSIS and CSE). The RCMP is covered by the Act, but with numerous exceptions: e.g. RCMP personnel cannot report reprisals directly to the Commissioner, but must first exhaust the RCMP’s internal processes.

The Act does not apply to the private sector nor to provincial governments.

The Act covers certain types of wrongdoing, set out in a ‘closed list’ list [s. 8]. Any wrongdoing that does not appear on this list may not be covered.

## Procedures

The act sets out procedures whereby:

1. the whistleblower can make a disclosure of wrongdoing, and the Commissioner *may* investigate
2. the whistleblower can complain of reprisals, and the Commissioner *may* investigate
3. the Tribunal *may* rule on complaints of reprisal referred to it by the Commissioner, and *may* order remedies for the whistleblower and disciplinary action for those responsible for the reprisals.

## Disclosure of a Wrongdoing

When someone discovers wrongdoing, this individual can ‘blow the whistle’ by making a *disclosure* in one of three ways:

- 1. to a designated person within their own department** [S. 10-12]  
Departments are required to set up internal procedures for handling disclosures, in accordance with guidelines that the Treasury Board will issue. The Act does not specify how these procedures will work. Whistleblowers are not obliged to use these internal procedures – they can go directly to the Commissioner.
- 2. to the Commissioner** [S. 13]  
The Act describes in detail the process for dealing with disclosures to the Commissioner.
- 3. to the Public (e.g. the media) but only under very limited circumstances** [S. 16]  
A disclosure to the media is considered ‘protected’ under certain very limited and subjective circumstances (see ‘Decision Criteria and Authority’).

Cabinet confidences and records covered by solicitor/client privilege cannot be disclosed under any circumstances. [s. 13(2)]

The whistleblower must provide ‘no more information than is reasonably necessary’ to make the disclosure, and must follow established procedures for handling the disclosed information. [S. 15.1]

## Investigation of a Disclosure

1. On receipt of a disclosure, the Commissioner must decide whether to begin an *investigation* or not. The Commissioner has considerable latitude to exercise judgment in making this decision. If the decision is not to investigate, that’s the end of the process. [S. 24]
2. If the decision is made to conduct an investigation, the Commissioner must inform the chief executive of the department (typically the Deputy Minister), and indicate the substance of the disclosure. The Commissioner may also inform anyone else, including those accused of wrongdoing. The Act gives the Commissioner the powers required to conduct an investigation, for example to subpoena witnesses. [S. 27]
3. After the investigation, if the Commissioner concludes that there is insufficient evidence of wrongdoing, the appropriate people are notified and that’s the end of the process. [S. 20.5]

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4. If the investigation indicates that wrongdoing has been committed, the Commissioner must report these findings (and recommendations) to the chief executive responsible for that part of the organization, possibly with a timeframe to respond. It then becomes this chief executive's responsibility to address the problem. [S. 36]
5. The Commissioner may also, if he or she considers it appropriate, report the matter to the Minister responsible. [S. 37]
6. If an investigation reveals wrongdoing the Commissioner must provide a *case report* to Parliament within 60 days, setting out the wrongdoing, any recommendations and the response of the responsible chief executive. [S. 38(3.1)]

### Investigation of Possible Reprisals

This is the process to investigate possible reprisals against a whistleblower, to provide a remedy to the whistleblower and possibly to discipline those involved in the reprisals.

1. The act prohibits taking or directing someone to take any reprisal against a public servant for blowing the whistle. [s. 19]
2. A whistleblower who believes that reprisals are being taken may approach the Commissioner with a *complaint*. [S. 19.1, 19.2]
3. This complaint must be filed within 60 days from when the complainant knew, or ought to have known, that a reprisal had occurred, although exceptions can be made if the commissioner feels it is appropriate under the circumstances.
4. On receipt of a complaint, the Commissioner must decide within 15 days whether to investigate or not. As with disclosures, the Commissioner has considerable latitude in exercising this discretion. If the decision is not to investigate, that's the end of the process. [S. 19.3]  
If the complaint is accepted, the Commissioner may appoint an investigator who investigates it in much the same way as a disclosure: but this time the focus is on whether reprisals have taken place. The Commissioner must inform various parties in writing of the investigation, including the person who has authority to take disciplinary action, against those accused of reprisals (typically the Deputy Minister of the Department). [S. 19.4, 19.8]
5. At any time during an investigation, the Commissioner may appoint a conciliator, whose job is to try to arrive at a *settlement*. This settlement may include a remedy for the whistleblower and/or disciplinary action for those involved in retaliation. The Commissioner has no power to impose a settlement. However, if a settlement is agreed upon by the whistleblower and those responsible for disciplining the retaliators, and if this settlement is also approved by the Commissioner, the complaint is dismissed and that is the end of the process. [S. 20]
6. When the investigation is complete, the Commissioner must decide whether the complaint should be referred to the Tribunal. In arriving at this decision, several factors are to be taken into consideration, but again the Commissioner has considerable discretion. [S.20.4(3)]

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7. If the Commissioner believes that an application to the Tribunal is ‘not warranted in the circumstances’, the appropriate people are notified, the case is dismissed, and that is the end of the process. [S. 20.5]

### **Referral of Complaints to the Tribunal**

If the Commissioner refers an application to the Tribunal, the Tribunal must determine whether or not a reprisal was taken against the complainant and may order a remedy for the complainant or disciplinary action against those carrying out reprisals.

Note that the Tribunal deals only with alleged reprisals against whistleblowers, not with the original wrongdoing.

1. The Tribunal has the power to call witnesses, to hear evidence from the parties involved, and to make a ruling regarding whether a reprisal took place or not. [S. 21]
2. The Tribunal can hold hearings in secret if either party requests this. [S. 21.3]
3. If the Tribunal rules that there has been no reprisal, that’s almost the end of the process. (There is still the possibility of a judicial review: see below.)
4. If the Tribunal rules that there has been reprisal it may order certain remedies for the whistleblower within the limits set out in the Act. [S. 21.7]
5. The Tribunal may also order disciplinary action against those responsible for the reprisal, including dismissal. [S. 21.8]
6. Any of the parties can request a ‘judicial review’ under the Federal Courts Act. This review process allows the case to be sent back to the Tribunal to ‘try again’ if some procedural error is discovered. A judicial review cannot substitute its decision or order a remedy – it can merely order the Tribunal to hear the case again.[S. 51.2]

### **Reporting and Oversight**

In addition to these procedures for dealing with *disclosures* and *complaints*, there are some requirements for reporting and oversight:

1. The Commissioner must provide an annual report to Parliament, setting out statistics such as the number of disclosures and complaints received, how these were disposed of and what corrective actions were taken. [S. 38]
2. The chief executive of each department must report annually to the Canada Public Service Agency (CPSA) [formerly the Public Service Human Resources Management Agency] regarding disclosures and complaints within that department, and the President of the CPSA must provide an annual report to Parliament, setting out statistics similar to those contained in the Commissioner’s report, but based on the departmental reports. [S. 38.1]

## Decision Criteria

The following are some of the criteria to be used in making decisions (e.g. regarding what courses of action are open to the Commissioner or the Tribunal).

### **Nature of the wrongdoing** [S. 8]

Wrongdoing in the private sector and in provincial governments is not covered unless it relates to a Federal government contract.

In order to qualify for protection under the Act, the wrongdoing disclosed must fall within the categories stipulated in the Act. They are:

1. a contravention of any federal statute,
2. the misuse of public money or assets,
3. gross mismanagement in the public sector
4. acting or failing to act in a way which endangers people or the environment
5. counseling a person to commit a wrongdoing.

Any wrongdoing not explicitly listed may not be covered. For example, Treasury Board Policies are not included per se. The responsibility will rest with the Commissioner to determine whether such violations fall under one of the broader categories listed in s. 8.

### **Disclosure to the public** [s. 16]

Disclosures to the public (e.g. the media) can be made only in extraordinary circumstances: there must not be sufficient time to disclose the information via other designated procedures (as listed above) and the wrongdoing must constitute a *serious* contravention of Canadian law, or pose an *imminent* risk of danger to persons or the environment.

### **Commissioner's acceptance of disclosures** [S. 24(1)]

The Commissioner can choose not to deal with a disclosure if he or she is of the opinion that:

- a. The matter should be dealt with under some other Act of Parliament (i.e. by someone else)
- b. The disclosure is not sufficiently important
- c. The disclosure was not provided in good faith
- d. It would serve no useful purpose because of the length of time elapsed since the alleged wrongdoing
- e. The disclosure relates to a matter that results from a balanced and informed decision-making process on a public policy issue
- f. There is a 'valid reason' for not dealing with the disclosure.

### **Commissioner's acceptance of complaints of reprisal** [S. 19.1(2), 19.1(3), 19.3(1)]

The Commissioner may refuse to deal with a complaint if:

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- a. The complaint is filed more than 60 days after the whistleblower knew that the reprisal was taken, or
- b. If the complaint is filed more than sixty days after the Commissioner believes that the whistleblower should have known that the harassment constituted reprisal.

The Commissioner may refuse to deal with a complaint if he or she is of the opinion that:

- a. The matter should be dealt with under some other Act of Parliament or a collective agreement (i.e. by someone else)
- b. The complaint is beyond the jurisdiction of the Commissioner
- c. The complaint was not made in good faith.

### **Commissioner's referral of a complaint to the Tribunal** [s. 20.4, s. 20.5]

The Commissioner has considerable discretion regarding whether to refer the case to the Tribunal. Even if reprisals have been confirmed by the investigation, the Commissioner may decline to refer the case to the Tribunal if this is 'not in the public interest', or 'not warranted in the circumstances', or if the Commissioner forms the opinion that the whistleblower was not acting 'in good faith'.

If the Commissioner declines to refer the case to the Tribunal, then the whistleblower's complaint is dismissed and that is the end of the process.

### **Authorities Granted**

The Act grants authority to the Commissioner to conduct investigations, and to the Tribunal to call witnesses. The following are some of the authorities granted which have a particular bearing on the fate of the whistleblower.

### **The Commissioner's powers to provide legal assistance to the whistleblower** [S. 25.1(4)-(6)]

The Commissioner may under certain conditions provide the whistleblower with legal assistance – up to the value of \$1,500 or \$3,000 in 'exceptional' circumstances.

### **The Tribunal's powers to provide a remedy for reprisals** [S. 21.7]

The Tribunal may order some or all of the following remedies for the whistleblower:

1. restoration to his or her original job, or payment in lieu if this is not feasible
2. reimbursement for any pay lost due to reprisals
3. reversal of disciplinary actions, and reimbursement for any financial loss caused by these actions
4. reimbursement for expenses and financial losses incurred as a direct result of the reprisals
5. compensation for pain and suffering up to a limit of \$10,000.

## **Information Restrictions**

The following provisions limit the amount of information that will ultimately be disclosed to the public.

### **Limited disclosure by the whistleblower**

In making disclosure the whistleblower is to provide ‘no more information than necessary’ [S. 15]

### **Amendments to the Access to Information Act [S. 222 of Bill C-2] and to the Privacy Act [S. 225 of Bill C-2]**

Any information gathered during the course of an investigation into wrongdoing becomes inaccessible under these Acts. In other words, these records must remain secret forever.

### **Orders for remedies and/or disciplinary action**

Orders by the Tribunal (e.g. regarding disciplinary actions taken because of reprisal against a whistleblower) do not need to be filed with the Federal Court. [S. 21.9]

## **The Private Sector**

The Act does not cover wrongdoing in the private sector. However public sector wrongdoing might involve the private sector or become known to individuals outside the public sector, and there are some provisions with respect to these situations.

1. By definition, only a public servant can make a ‘protected disclosure’ (and thus have the right to submit a complaint to the Commissioner in event of retaliation). [S. 2(1)]
2. The Commissioner can conduct an investigation into public sector wrongdoing on the basis of information provided by someone who is not a public servant. [S. 33(1)]
3. During an investigation, the Commissioner must abandon any line of inquiry that requires information from outside the public sector (and may refer the matter to some other authority). [S. 34]
4. Private sector employers are prohibited from taking certain actions against an employee solely because that individual has provided information to the Commissioner. [S. 42.1]
5. Public servants are prohibited from taking certain actions against a private sector contractor solely because that individual provided information to the Commissioner. [S. 42.2]