



**PUBLIC INTEREST
COMMISSIONER**

Public Interest Disclosure Act

Practice and Procedure Considerations for
Chief and Designated Officers

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Introduction

The *Public Interest Disclosure (Whistleblower Protection) Act* [PIDA] came into force on June 1, 2013 by proclamation of the Lieutenant Governor in Council. PIDA is a cornerstone of the Government of Alberta's accountability, transparency and transformation mandate and will enhance public confidence in elected officials, public institutions, and staff delivering programs and services to Albertans. This legislation facilitates the disclosure and investigation of wrongdoing in the public sector through an internal process (except in specific circumstances, where employees can directly disclose to the Public Interest Commissioner) and will protect public employees from reprisal for making a disclosure.

The purposes of the Act are to:

- Facilitate the disclosure and investigation of significant and serious matters in or relating to departments, public entities or offices of the Legislature, that an employee believes may be unlawful, dangerous to the public or injurious to the public interest,
- Protect employees who make disclosures,
- Manage, investigate and make recommendations respecting disclosures of wrongdoings and reprisals,
- Promote public confidence in the administration of departments, public entities and offices of the Legislature.

Application

This legislation applies to **employees** of the Alberta Public Service Departments; Offices of the Legislature; Public Entities including Provincial Corporations, boards and commissions, post-secondary academic institutions, school boards, charter schools and accredited private schools that receive grants; and public sector health entities, including medical staff and professional staff.

Wrongdoings

"Wrongdoing" is defined as:

- *a contravention of an Act, a regulation made pursuant to an Act, an Act of the Parliament of Canada, or a regulation made pursuant to an Act of the Parliament of Canada;*
- *an act or omission that creates a substantial and specific danger to the life, health or safety of individuals other than a danger that is inherent in the performance of the duties or functions of an employee;*
- *an act or omission that creates a substantial and specific danger to the environment;*
- *gross mismanagement of public funds or a public asset; and*
- *knowingly directing or counseling an individual to commit a wrongdoing.*

Developing Policies and Procedures

The Public Interest Commissioner offers this general framework for Chief Officers and Designated Officers to consider when developing or revising PIDA policies and procedures. Additional information is available by contacting the Public Interest Commissioner.

Section 5 of the Act requires every Chief Officer of a Department, Office of the Legislature and Public Entity to establish an internal process to manage and investigate reports of wrongdoing. Minimum procedure requirements must be established, including:

- Procedures for receiving and reviewing disclosures including setting time periods for making recommendations to the department, public entity or office of the legislature respecting any corrective measures that should be taken.
- Procedures for referring a disclosure to another department, public entity, or office of the Legislature if the disclosure would more appropriately be dealt with there;
- Procedures must address referring a disclosure to the Commissioner if the disclosure is believed to be a matter of imminent risk of a substantial or specific danger to the life, health or safety of individuals, or to the environment;
- Procedures for reviewing and investigating disclosures must be in accordance with the principles of procedural fairness and natural justice;
- Procedures for investigating other wrongdoings discovered during the investigation;
- Procedures for reporting alleged offences under an Act or regulation or under an Act or regulation of the Parliament of Canada, if discovered during an investigation;
- Procedures for maintaining the confidentiality of information collected in relation to disclosures and investigations - *Exception – if disclosure is determined to be an imminent risk these procedures may not necessarily apply*
- Procedures for protecting the identity of individuals involved in the disclosure process, including the employee making the disclosure, individuals alleged to have committed the wrongdoings, and any witnesses or third parties;
- Procedures for reporting the outcomes of investigations of disclosures;
- Procedures for enforcement and follow-up of any disciplinary action or corrective measures taken or directed.

Procedures should include direction for employees who are considering making a disclosure, on how to request information from their designated officer, chief officer or the Office of the Public Interest Commissioner. This would include guidelines when an employee can make a disclosure directly to the Office of the Public Interest Commissioner as detailed in Section 10 PIDA. It should be noted the request may be required to be made in writing.

In accordance with Section 6 of the Act, each chief officer must ensure information about the Act and the procedures established under section 5 are widely communicated to the employees which the chief officer is responsible for.

Receiving and Managing Disclosures

Disclosure to a Designated Officer

The Chief Officer of a public entity is required to designate a senior official to manage and investigate disclosures under the Act, known as a **Designated Officer**. If no designation is made, the Chief Officer is the designated officer for the purposes of the Act. Normally, PIDA disclosures of wrongdoing must be made to the public entity's Designated Officer. Disclosures must be made in writing and include the following information as specified under Section 13 of the Act:

- A description of the wrongdoing;
- The name of the individual(s) alleged to have committed or about to commit the wrongdoing;
- The date(s) of the wrongdoing;
- Any additional information about the wrongdoing the designated officer may reasonably require in order to investigate the matters set out in the disclosure.

Public entities may prescribe additional information be included as part of a disclosure document to reflect the unique nature of the entity and to facilitate a full-disclosure for the purposes of an investigation.

At the time an employee makes a disclosure to the designated officer, the employee may also disclose to the Public Interest Commissioner and advise the disclosure has been made. The Commissioner will accept notice a disclosure has been made to the Designated Officer, however will not initiate an investigation at this stage.

An employee who is considering making a disclosure may request information or advice from the employee's designated officer or chief officer, or from the Commissioner. Sample disclosure forms are available on the Public Interest Disclosure Commission website at <http://www.pic.alberta.ca/forms>.

Processing Disclosures

Upon receipt of a disclosure, a Designated Officer must record the date of receipt and create a record of the disclosure. The Designated Officer must assess the disclosure relative to the Act and Regulations to determine whether the Act applies. Considerations include:

- The date of the alleged wrongdoing,

- > Under Section 3(2), the Act applies only in respect of wrongdoings that occur after the coming into force of the Act. By proclamation the Act came in to force on June 1, 2013.
- Whether the disclosure was made by an employee of the public entity;
 - > A disclosure must be made by an employee for whom the Chief Officer is responsible
- The nature and veracity of the disclosure;
 - > A disclosure must be made by an employee, in good faith, in accordance with the Act.
 - > The disclosure must be in relation to a “wrongdoing” as defined in the Act.

Timelines

The *Public Interest Disclosure Regulations* mandate a timely and expeditious management for receiving, reviewing and investigating a disclosure of wrongdoing or complaint of wrongdoing.

- A disclosure of wrongdoing must be acknowledged not more than **5 business days** from the date on which the disclosure or complaint is received.
- Not more than **10 business days** from the date on which the disclosure of wrongdoing is received, a decision whether to investigate must be made and the employee who submitted the disclosure or complaint must be notified.
- An investigation must be concluded not more than **110 business days** from the date on which the disclosure of wrongdoing or complaint of reprisal is received is received.
- A public entity’s Chief Officer may grant an extension not to exceed 30 business days.
- The Public Interest Commissioner may grant an extension exceeding 30 business days in the interest of a fair and efficient outcome, consistent with the purposes of the Act.
- If the Designated Officer believes the matter constitutes an imminent risk to the life, health or safety of individuals, the Designated Officer will, as soon as practicable, refer the disclosure to the Commissioner to be dealt with under Section 10(2) of the Act.

Procedure Timeline



Investigating Disclosures

Procedural Fairness

Natural justice and procedural fairness are essential considerations of Public Interest Disclosure Act investigations. The Commissioner considers eight fairness factors when determining if natural justice and administrative fairness prevailed:

- a. **Chain of legislative authority.** What legislation created the authority or power enabling a decision maker to receive and manage a disclosure? The findings of the Designated Officer should reference how the public entity is subject to the Act, and demonstrate the Chief Officer has appointed the individual to serve as the Designated Officer. The letter of appointment should be retained by the Designated Officer.
- b. **Duty of fairness.** The courts require decision-making which affects the rights of individuals must follow a fair process. This duty of fairness means there must be procedural fairness in decision-making.
- c. **Participation rights.** Was the complainant given a full and fair opportunity to present their case to the decision-maker? Was there appropriate disclosure of the matter to the person the allegation was directed.
- d. **Adequate reasons.** There must be a rational connection between the evidence presented and the conclusions reached by the decision-maker. The decision and the reasons must be communicated clearly and identified by the decision-maker.
- e. **Reasonable apprehension of bias.** An apprehension of bias occurs when a Designated Officer fails to act fairly, fails to link decisions to evidence before him or her, or fails to clearly articulate reasons for the decision. Decision makers are expected to exercise impartiality and independence including relationships to all parties in the matter, both internally and externally.
- f. **Legitimate expectation.** Did the decision-maker fail to honour a commitment or follow regular procedures?
- g. **Exercising discretionary power.** What discretionary authority is established in the Act, Regulation, or Policy Guidelines, etc. Discretionary decisions are reviewed to determine if there is evidence of bad faith, improper purpose, or irrelevant considerations.
- h. **Was the decision reasonable?** A reasonable decision does not equate to whether the decision is wrong or whether it might have been decided in a different way. A reasonable decision should indicate how the decision-maker(s) considered and assessed the arguments and evidence.

Managing Investigations

The Designated Officer is responsible for managing and investigating disclosures for his or her public entity. The Designated Officer may delegate all or part of an investigation to another person but remains responsible for ensuring a complete and fair investigation takes place. Key considerations in managing investigations include:

- The Designated Officer must receive, assess, investigate and determine the outcome of a disclosure within the time frame set out in the Act. It is important to document the date a disclosure was received.
- Investigations must be conducted in a manner to ensure that the right to procedural fairness and natural justice is respected, including in respect of individuals making disclosures, individuals alleged to have committed a wrongdoing, and witnesses.
- If, during an investigation, the Designated Officer has reason to believe that another wrongdoing has been committed or may have been committed, the Designated Officer may investigate that wrongdoing.
- If more than one disclosure is received by a Designated Officer in respect of the same matter, a single investigation may be conducted rather than a separate investigation with each disclosure.
- If, during an investigation, the Designated Officer believes that an offence has been committed under an Act or Regulation or Act or Regulation of the Parliament of Canada, the appropriate authorities will be advised
- The Designated Officer may elect not to investigate if the disclosure is vexatious or made in bad faith.
- The Designated Officers must record why they commenced an investigation or declined to do so.

The Designated Officer may request advice from the Chief Officer or the Public Interest Commissioner with respect to the management and investigation of the disclosure.

Collection, Use and Disclosure of Information

The Act permits a designated officer or a chief officer to collect, directly or indirectly, use and disclose

- Personal Information, as defined in the *Freedom of Information and Protection of Privacy Act*,
- Individually Identifying Health Information, within the meaning of the *Health Information Act*; and
- Any other information considered necessary to manage and investigate disclosures under the Act.

Disposition of Investigations

The outcome or disposition of an investigation may vary based on the information developed during the investigation and the severity of the wrongdoing. The disposition of an investigation may include:

- **Founded**

- a. **Reasonable Human Resource or Management Decision**

- Section 27 of PIDA, prescribes no action lies against a department, public entity or office of the Legislature, or an employee of any of them, for making a reasonable human resource management decision in good faith.

- b. **Recommendations made for additional action to be taken**

- Section 4 of PIDA, prescribes in addition to any sanction provided for by law, an employee who commits a wrongdoing is subject to appropriate disciplinary action, including termination of employment.

- c. **Referred to appropriate authority**

- If during an investigation of a disclosure, a designated officer has reason to believe an offence has been committed under an Act or regulation, the offence must be reported to the appropriate authority in accordance with the procedures.

- d. **Referred to Public Interest Commissioner**

- If the designated officer reasonably believes the disclosure constitutes an imminent risk of substantial or specific danger to the life, health or safety of individuals, or to the environment, the disclosure must be referred to the Commissioner as soon as reasonably practicable.

- **Alternative Resolution**

A disclosure that relates to a matter that could more appropriately be dealt with according to the procedures under a collective bargaining agreement or employment agreement, is not required to be investigated. A dispute between an employer and employee may be more appropriately addressed through an internal or alternative dispute resolution process.

- **Non-Jurisdictional**

A disclosure may be non-jurisdictional if:

- The disclosure has been made by someone other than an employee,
 - The disclosure is frivolous or vexatious; not been made in good faith,
 - The disclosure does not deal with a wrongdoing; is not required to be investigated,
 - The disclosure relates to a matter that occurred prior to June 1, 2013.

The Designated Officer may elect to investigate non-jurisdictional disclosures to address an isolated or systemic issue within the public entity that gave rise to the disclosure.

- **Unfounded**

Disclosures of Wrongdoings that are investigated and subsequently unfounded, may not warrant a human resource or disciplinary action, however may warrant a review of internal policy to determine what resulted in the perceived wrongdoing and what amendments can be made to avoid future perceptions of wrongdoing. **It is important to note that no action may be taken against an employee who has made a disclosure in good faith, even if the alleged wrongdoing is unfounded.**

The Public Interest Commissioner

The purpose of an investigation by the Commissioner is to bring the wrongdoing or reprisal to the attention of the affected department, public entity or office of the Legislature, to recommend corrective measures, and to promote public confidence in the administration of the departments, public entities and offices of the legislature.

An employee may make a disclosure directly to the Commissioner only in certain circumstances:

- If no procedures have been established within the employees department, public entity or Legislature for making disclosures;
- If the employee has made a disclosure in accordance with the procedures and an investigation has not been completed in accordance with the procedures;
- If the employee has made a disclosure in accordance with the procedures and the matter has not been resolved with the time periods established;
- If the investigation under the procedures has been completed, a final decision has been issued and the employee is dissatisfied with the decision;
- If the subject matter of the disclosure involves the employee's chief officer or designated officer;
- If the employee reasonably believes a matter constitutes an imminent risk of a substantial and specific danger to the life, health or safety of individuals or the environment, such that there is insufficient time to make a disclosure to a designated officer.
- If the employee has made a disclosure and is unable to complete the procedures because a reprisal has been taken or directed against the employee,
- If the employee reasonably believes a reprisal is likely to be taken or directed against the employee if the disclosure is made to the designated officer or chief officer.

The Commissioner may receive and may choose to investigate an allegation of wrongdoing made anonymously or by an individual who is not an employee.

Reporting Requirements

Investigation Report

- A Designated Officer must provide his or her investigation report to the Chief Officer, in writing, on or before a date prescribed in the *Public Interest Disclosure Regulations*.
- A Designated Officer must manage electronic or paper records to assist the Chief Officer in fulfilling his or her reporting obligations.
- The Designated Officer must take reasonable steps to gather, manage and retain records required to conduct a full and fair investigation of disclosures of wrongdoings or reports of reprisals.
- The Designated Officer is responsible for a reasonable standard of confidentiality to protect the identity of the reporting employee.
- Records, including books, records, reports, documents or other items including electronic records and documents, are to be treated as strictly confidential and secured in a manner and location to protect from unauthorized access.
- A disclosure and any subsequently generated records (e.g., electronic or written correspondence, subsequent records, notes, exhibits, or investigative reports) must be maintained separate and secure.
- Pertinent verbal information must be documented in writing.

Annual Reporting

The Chief Officer must prepare a report annually on all disclosures made to the Designated Officer which is to be included in the annual report. If the annual report is not made publicly available, the Chief Officer must make the report available to the public upon request.

The annual report must include:

- The number of disclosures received by the designated officer, the number of disclosures acted on and the number of disclosures not acted on by the Designated Officer;
- The number of investigations commenced by the Designated Officer as a result of disclosures; and
- In the case of an investigation that results in a finding of wrongdoing, a description of the wrongdoing and any recommendations made or corrective measures taken in relation to the wrongdoing or reasons why no measure was taken.

Complaint of Reprisal

Protection for employees who seek advice, make a disclosure, participate in an investigation of a disclosure, or refuse to participate in a wrongdoing are protected from adverse employment action under PIDA. Reprisals are specifically defined as:

- *a dismissal, layoff, suspension, demotion or transfer, discontinuation or elimination of a job, change of job location, reduction in wages, change in hours of work or reprimand;*
- *any measure, other than one mentioned above, that adversely affects the employee's employment or working conditions;*
- *a threat to take any of the measures mentioned above*

It is important to clearly state in the procedures that the employee has the choice of contacting the Public Interest Commissioner or their agency's designated officer at any time when; they are seeking advice about the Act, disclosing a wrongdoing, or to make a complaint when they believe they have been the subject of a reprisal. The "Complaint of Reprisal Form", as illustrated in Section 3 of the Regulation, must be used when making a complaint and must be made available to employees as part of the procedure. The form is available on the Public Interest Commissioner website at <http://www.pic.alberta.ca/forms>.

Offences

PIDA establishes strict penalties of up to \$25,000 for the first offence, and up to \$100,000 for each subsequent offence. Offences include the following:

- committing a reprisal (section 24)
- withholding information, making a false or misleading statement, or counseling or directing another person to do so (section 46)
- obstructing, counseling or directing another person to obstruct, any individual acting in an official capacity under this Act (section 47)
- destroying, mutilating, altering, falsifying, or concealing any document or thing that may be relevant to an investigation; or directing or counseling another person to do so (section 48)

If you have questions about the *Public Interest Disclosure Act*, are seeking advice, or wish to make a Disclosure of Wrongdoing or Report a Reprisal, contact the office of the Public Interest Commissioner:

Mail: 10303 Jasper Avenue NW
Suite 2800
Edmonton, Alberta, T5J 5C3

Phone: 1-855-641-8659

E-mail: info@pic.alberta.ca