

May 28, 2021

Sent via Email

Mr. David B. Hanson
Chair
Standing Committee on Resource Stewardship
Legislative Branch
10800 – 07 Avenue NW, 503F
Edmonton, AB T5K 2B6
c/o RSCCommittee.Admin@assembly.ab.ca

RE: Review of the *Public Interest Disclosure (Whistleblower Protection) Act* by the Standing Committee on Resource Stewardship

Dear Mr. Hanson:

I appreciated the opportunity to appear before the Committee on April 28, 2021 to review and answer questions in relation to my report – *Report on the Public Interest Commissioner’s position to stakeholder recommendations*.

There were two topics that resulted in significant discussion during the meeting. I would like to provide the Committee with additional clarity on these topics, as it deliberates potential amendments.

1. Regarding the criteria for what constitutes a disclosure of wrongdoing under the Act

Questions arose regarding the criteria used for determining what constitutes a disclosure of wrongdoing requiring an investigation. When reviewing a complaint, the criteria applied is set out in sections 9, 13 and 19 of the Act.

Section 9 – Disclosure concerning a department, public entity or office

Section 9 of the Act authorizes employees to make formal disclosures of wrongdoing to either their designated officer or to the Public Interest Commissioner. Disclosures of wrongdoing may not be made through a supervisor, a human resource department or through any other mechanism.

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Section 13 – Contents of Disclosure

Section 13 requires the disclosure is made in writing, and if known:

- 1) provide a description of the wrongdoing;
- 2) provide the name of the individual or individual(s) alleged to have committed the wrongdoing;
- 3) identify when the wrongdoing is alleged to have occurred;
- 4) indicate whether a disclosure has already been made to a designated officer, and
- 5) provide any additional information the designated officer or Commissioner may reasonably require to investigate the matters set out in the disclosure. (This information is generally obtained through subsequent contact with the complainant).

The Commissioner is not required to investigate where the complaint has been unable to provide adequate particulars about a wrongdoing to permit the conduct of a fair and effective investigation.¹ This circumstance is seen in anonymous complaints where limited information has been provided. The Commissioner is also not required to investigate a complaint that does not describe a wrongdoing under the Act.² The test currently applied is whether, on a *prima facie* basis, the complainant is describing something which may constitute wrongdoing defined in the Act.

Section 19 – When investigation not required

Section 19 outlines the circumstances under which legislators believed the Commissioner is not required to investigate a disclosure. In reviewing complaints, my office assesses whether any of those circumstances apply. Where a decision is made not to investigate a disclosure because of a provision in section 19, I am required to notify the employee and the affected department, public entity or office of that decision.

2. Regarding protections for employees who seek advice from supervisors

Questions also arose in relation to the degree of protection the Act currently affords to employees who report wrongdoing to their supervisor. In the broadest sense – employees are protected by the Act whenever they do something under the Act. In other words, the Act needs to be triggered by some action. This is typically either a request for advice or a complaint. This is generally why the Act requires organizations have procedures in place for employees to follow when reporting wrongdoing and seeking advice.

¹ Section 19(1)(f) *Public Interest Disclosure (Whistleblower Protection) Act*

² Section 19(1)(d) *Public Interest Disclosure (Whistleblower Protection) Act*

Prior to amendments in 2018, there was a deficiency in the Act in that employees who sought advice from their supervisors were not protected. It was recognized that some employees want to confide in or get advice from a supervisor prior to deciding whether to make a formal disclosure of wrongdoing. Amendments to the Act in 2018 created protections for employees seeking advice from supervisors with the inclusion of section 8(1), which states:

8(1) *An employee who is considering making a disclosure may request information or advice from the employee's supervisor, designated officer or chief officer or from the Commissioner. [emphasis added]*

The protection from reprisal provisions outlined in section 24 of the Act was also amended to protect employees who seek advice from supervisors:

Reprisals

24(1) *This section applies to an employee or a prescribed service provider who has, in good faith,*

- (a) *Requested advice about making a disclosure as described in section 8... whether or not the employee made a disclosure. [emphasis added]*

The Act distinguishes between seeking advice from a supervisor and making a disclosure of wrongdoing. Disclosures of wrongdoing may not be made through a supervisor, a human resource department or through any other mechanism. Disclosures may only be made to the designated officer or to the Commissioner for a number of reasons:

- 1) It enables certainty that the matter reported is addressed under the Act and that the protection provisions of the Act apply. When an issue is reported under any other mechanism, then ambiguity exists as to whether the individual is a “whistleblower” for the purposes of the Act.
- 2) The Act authorizes employees to disclose personal information, individually identifying health information, financial information, and other confidential information that, when reporting through any other channel, may be considered a breach of privacy laws or employment confidentiality agreements.
- 3) Designated officers and the Commissioner’s office have the specific knowledge and expertise to review complaints and conduct investigations under the Act. It is not practicable for all supervisors within the public service to undertake this function.
- 4) The Act affords a degree of confidentiality that does not exist through other complaint mechanisms.

During the meeting, committee members sought clarification on whether the protection provisions of the Act would apply if an employee makes a whistleblower complaint to their supervisor. From a practical perspective, once an employee discusses making a

whistleblower complaint with a supervisor, this is considered seeking advice for the purposes of the Act, and the employee is subsequently protected. In a scenario where an employee submits a formal disclosure of wrongdoing to a supervisor, the employee would be protected; however, the supervisor is not authorized to undertake an investigation under the Act. It is incumbent on supervisors within the public service to be able to direct employees to the whistleblower procedures established by the organization.

However, in a scenario where an employee makes a general complaint to a supervisor outside the auspices of the Act, the Act does not extend whistleblower protections to that employee. In that scenario, they have not done anything under the Act to trigger those protections.

If the committee considers extending whistleblower protections to employees regardless of who they report it to or under what mechanism used, there are several challenges to consider:

- 1) There would no longer be an established mechanism (i.e., the process outlined in the Act) for determining what constitutes wrongdoing. Individual employee and employer perspectives on what constitutes wrongdoing becomes subjective and may result in arbitrary decisions.
- 2) As a result of this ambiguity, individuals may invoke whistleblower protection for raising any concern with a supervisor. Given the number of concerns brought to supervisors by their staff within the public service on a daily basis, this could significantly hamper the public service in its ability to make reasonable human resource management decisions.
- 3) Supervisors may become burdened with conducting assessments on every matter brought to them by employees to determine whether the Act and whistleblower protections should apply.
- 4) The Public Interest Commissioner would be required to investigate whether any human resource action taken against an employee is the result of the employee reporting a concern to a supervisor – regardless of whether or not the concern constitutes wrongdoing under the Act.
- 5) The Act may hold supervisors and the applicable public entity liable for a reprisal after making a reasonable human resource management decision or business decision, if the employee or member of the public perceives a concern they brought forward to be a “whistleblower” complaint - regardless of how they reported it, the nature of their complaint, or whether the complaint has merit.

An employee choosing to seek advice about the Act from a supervisor, or choosing to report wrongdoing using the Act, is a personal and conscious decision that is made by the individual employee. The Act, in its current form, has established a clear process for doing so.



Thank you for the opportunity to provide further clarity on these topics. I hope this explanation assists the committee in its work. In the interest of transparency, I would fully support this letter being posted on the Committee's website.

Sincerely,

Marianne Ryan
Public Interest Commissioner

CE/lja