PUBLIC INTEREST COMMISSIONER

A report of the Public Interest Commissioner in the matter of disclosures of wrongdoing and a complaint of reprisal under the *Public Interest Disclosure (Whistleblower Protection) Act*

Referenced Case
Case: #PIC-14-02130

Allegations related to the Department of Justice and Solicitor General

June 2, 2016

Generic language is used in this report to protect the identity of the parties involved.

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PUBLIC INTEREST COMMISSIONER

Marcia Nelson
Deputy Minister
Alberta Executive Council
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Dear Deputy Minister Nelson:

I am pleased to provide my report, "Allegations Related to the Department of Justice and Solicitor General" as required by section 22 of the *Public Interest Disclosure (Whistleblower Protection) Act*.

Peter Hourihan, B.Admin, LL.B
Public Interest Commissioner

Edmonton, Alberta
June 2, 2016

PUBLIC INTEREST COMMISSIONER

Philip Bryden
Deputy Minister and Deputy Solicitor General
Alberta Justice and Solicitor General
9833 – 109 Street NW, Floor 2
Edmonton, AB T5K 2E8

Dear Deputy Minister Bryden:

As Deputy Minister of Justice and Solicitor General, you are the department's Chief Officer for the purposes of the *Public Interest Disclosure (Whistleblower Protection) Act*. I am pleased to provide my report, "Allegations Related to the Department of Justice and Solicitor General" as required by section 22 of the *Public Interest Disclosure (Whistleblower Protection) Act*.

Peter Hourihan, B.Admin, LL.B
Public Interest Commissioner

Edmonton, Alberta
June 2, 2016

PUBLIC INTEREST COMMISSIONER

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Foreword

An effective public service depends on the commitment of everyone who works in it to maintain the highest possible standards of honesty, openness and accountability. The *Public Interest Disclosure (Whistleblower Protection) Act* (the Act) creates a confidential avenue for public servants to speak out about wrongdoings or make complaints of reprisal. Employees covered by this legislation can choose to report internally or, in limited circumstances, directly to the Public Interest Commissioner (the Commissioner). Whether the matter is investigated by the public entity or the Commissioner, Albertans expect the investigation will be thorough, objective and complete. Whistleblowers have the same expectation, and must have confidence their concerns will not be met with reprisal. Management needs to ensure this and should embrace whistleblowing as an opportunity to make positive change.

The Act came into force June 2013, and facilitates the disclosure and investigation of significant and serious matters or reprisals occurring in government departments, offices of the Legislature and public entities (including provincial agencies, boards and commissions, post-secondary academic institutions, school boards, charter schools, accredited private schools that receive grants and public sector health entities).

Section 22(1) of the Act stipulates the Commissioner must prepare a report on completion of an investigation which sets out the findings, reasons for those findings and any recommendations considered appropriate respecting the disclosure and the wrongdoing. This report fulfills that requirement.

Mandate

The Commissioner is an independent Officer of the Legislature, who reports to the Legislative Assembly as a whole. Investigators conduct investigations and provide advice as required in respect of disclosures and complaints of reprisals for employees of provincial government and other jurisdictional public entities.

The Act states the purposes of the office are:

> (a) 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,
> (b) to protect employees who make those disclosures,
> (c) to manage, investigate and make recommendations respecting disclosures of wrongdoing and reprisals,
> (d) to promote public confidence in the administration of departments, public entities and offices of the Legislature …

Our larger aim is to promote a culture in the public sector where employees and managers share a common goal of reporting, investigating and changing practices to prevent or remedy wrongdoings.

Wrongdoings are defined in the Act as:

> (a) 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;
> (b) an act or omission that creates
> (i) 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, or
> (ii) a substantial and specific danger to the environment;
> (c) gross mismanagement of public funds or a public asset;
> (d) knowingly directing or counselling an individual to commit a wrongdoing mentioned in clauses (a) to (c).

The purpose of an investigation by the Commissioner is to bring the wrongdoing to the attention of the affected department, public entity or office of the Legislature and to recommend corrective measures. This promotes confidence in the administration of the department, public entity or office of the Legislature and encourages whistleblowers to come forward without fear of reprisal.

Allegations

On August 18, 2014, the Commissioner received a disclosure of wrongdoing from the Chief Medical Examiner (CME) at the time, against the Department of Justice and Solicitor General (the department) and a former Assistant Deputy Minister (ADM) of Justice Services Division. On October 16, 2014, the CME submitted a complaint of reprisal against the department and made an additional disclosure of wrongdoing. Specifically:

1. It was alleged the department grossly mismanaged contracted services for the transportation of deceased persons. The allegation stemmed from a public procurement by the department for these services. It was alleged the Minister of Justice and Solicitor General at the time, instructed the department to revise the terms and conditions of the procurement as a result of lobbying by the Alberta Funeral Services Association (AFSA), and the decision was politically motivated. The CME indicated the changes to remuneration for service providers would increase costs for transporting deceased persons by approximately $950,000 per year. The CME alleged the actions by the department constituted gross-mismanagement of public funds – a wrongdoing under the *Public Interest Disclosure (Whistleblower Protection) Act*.

2. The CME made broad allegations of interference by the department in the operations of the Office of the Chief Medical Examiner (OCME) thereby contravening the *Fatality Inquiries Act*. This included alleged interference by department officials in the procurement of services to transport deceased persons for the OCME. The CME made one specific allegation against an ADM of Justice Services Division at the time. It was alleged the ADM contacted an employee of the OCME and instructed them to remove a letter from a mailbag and shred it. The CME alleged this interfered with the CME and contravened the *Fatality Inquiries Act*; a wrongdoing under the *Public Interest Disclosure (Whistleblower Protection) Act*.

3. The CME made a complaint of reprisal. The CME alleged, as a result of reporting wrongdoing, the department did not renew their fixed-term contract of employment. Section 24 of the *Public Interest Disclosure (Whistleblower Protection) Act* prohibits an employer from taking adverse employment action against an employee as a result of the employee making a disclosure of wrongdoing in accordance with the Act. A reprisal is an offence under the Act.

Findings

1. **The actions of the department, in contracting services for the transportation of deceased persons, did not constitute gross mismanagement of public funds and therefore were not wrongdoings under section 3(1)(c) of the Act for the following reasons:**
    - The department's management of the procurement process was poor; however, not to the extent of what is determined to be "gross-mismanagement".
    - Although the decision by the department to revise the terms of the procurement would likely result in increased costs, the actions were based on a legitimate concern that service providers would not be available to transport deceased persons.

- There is a lack of evidence supporting the allegation the Minister instructed the department to revise the terms and conditions of the procurement. The evidence supports the department misinterpreted the Minister's direction.

2. **The actions of the department did not interfere with the OCME in a manner which contravened the *Fatality Inquiries Act* and therefore did not constitute wrongdoing under section 3(1)(a) of the Act, for the following reasons*:***
    - Although the department officials assumed control of the procurement of services to transport deceased persons for the OCME, procurement for these services is not a defined 'duty' of the CME in the *Fatality Inquiries Act*. The procurement of services is an administrative function of the department. Therefore, the actions of the department did not contravene the *Fatality Inquiries Act*.
    - The actions of the ADM may have hindered the CME from sending correspondence; however, this was not done in a manner which contravened the *Fatality Inquiries Act*. The matter was the result of miscommunication by department staff.

3. **The decision by the department not to renew the CME's contract of employment did not constitute a reprisal under section 24 of the Act for the following reasons:**
    - Although the decision not to renew the CME's contract was made subsequent to the CME making a disclosure to the Public Interest Commissioner, there was no conclusive evidence linking the CME's disclosure to the Commissioner as the specific reason for the decision. The evidence supports the decision was a human resource management decision.
    - The human resource management decisions were not specifically linked to the act of the CME making a disclosure to the Commissioner.
    - The non-renewal of a contract of employment does not constitute a dismissal of employment.

Note: Observations relative to these findings are addressed later in this report on pages 27 - 29.

Overview

The investigation encompassed an extensive review and analysis of 5,571 records, a review of department policies, applicable legislation, best practice standards for procurements and internal legal reviews on matters of law. Thirty-seven (37) employees of the Government of Alberta were interviewed as part of the investigation. This included 19 current and former employees of the OCME. Written responses were received from the department, from the then-Minister of the department, and from the then-Deputy Minister (DM) of the department. The investigation included interviews of members of the funeral services industry and a written response from the AFSA.

Though the allegations of wrongdoing are not supported, our investigation highlighted deficiencies in management, procurement and human resource services practices within the department. The investigation also highlighted how poor communication between managers and employees can result in a breakdown of the employment relationship and manifest into larger issues.

The allegation of gross-mismanagement of public funds by the department

Process of Investigation

The investigation sought to determine whether the actions of the department constituted a gross mismanagement of public funds. Mismanagement may be characterized as managing something badly, carelessly or wrongly - deliberately or not, which may have a negative impact on an organization. The *Public Interest Disclosure (Whistleblower Protection)* Act (the Act) specifies wrongdoing as being a "gross mismanagement" of public funds or public assets. In considering the difference between mismanagement and a gross mismanagement, the facts of the matter are examined to determine whether the acts or omissions are deliberate and exhibit a reckless or willful disregard for the efficient management of significant government resources.

The investigation of this issue considered procurement policies and practices and how they applied during the procurement of services to transport deceased persons. We examined the circumstances surrounding the decision to revise the terms and conditions of the procurement, the rationale for the decision and how the process of revising the procurement took place.

Facts of the Investigation

The requirement for the procurement

The department historically used local funeral homes across Alberta for transporting deceased persons from rural areas to the OCME. The CME conducted a transportation policy review following the receipt of complaints regarding funeral homes transporting deceased persons. The CME reported there was inconsistency in how fees were being claimed under the *Fatality Inquiries Regulation* (the Regulation).

Fees for transporting deceased persons are prescribed in the Regulation:

> ***3(1)*** *The fee payable to a person who transports a body is up to $300 per vehicle for the first 20 kilometres and up to $1.13 a kilometre for transportation and attendant services.*

Some funeral home service providers interpreted the $300 fee to include each leg of a trip for transporting a deceased person. Therefore, in certain circumstances the $300 fee was being charged multiple times on each case. There was a lack of consistency in the approval of claims for the reimbursement of services.

The CME sought a fee payment structure of a single $300 fee (plus mileage) paid to a service provider for transporting a deceased person from the place of death, to the OCME, and back to the place of death. In consultation with procurement and legal services, the CME developed a contract for service providers to clarify compensation and expected service standards.

The type of procurement used

The department elected to use a standing offer contract for vendors to provide transportation of deceased person services. A "standing offer" is an agreement obligating a supplier to provide services under specified conditions during a set period of time at a predetermined price structure. A standing offer does not contain legal obligations to contract for any services; services are obtained at the discretion of the contractor.

A competitive public tendering process was used. The "*Pre-Qualification Request … Standing Offer for Transportation of Decedents*" (the standing offer) was posted for public tender on March 19, 2014. The pre-qualification request was intended to develop a list of qualified contractors who met specific criteria or requirements to provide transportation of deceased person services. Contractors who decided to submit a response and met the pre-qualification requirements could potentially enter into a contract with the department to provide transportation of deceased person services if and when they were needed.

The requirements (specific criteria) for the procurement were determined by the OCME. The CME worked with the department's legal services branch and procurement branch to define quality criteria and requirements for service providers in the standing offer. This included compensation, vehicle requirements, attire and the requirement for criminal record checks. The contract also established a requirement for service providers to wait at the OCME for examinations to be complete.

The approval of the standing offer

The term of the standing offer was two years with a maximum value of $4.5M. In addition to the CME, the standing offer was reviewed and approved by the procurement branch, legal branch, the ADM of the division, and the DM of the department. Procurement officials advised at the time the standing offer was posted there were no terms or conditions in the standing offer identified as excessive or extraordinary. In their opinion, the process was fair, open and transparent.

The response to the standing offer

A total of 84 interested vendors accessed the bid package. Sixty-three percent (63%) of interested vendors were part of the funeral services industry and 56% of interested vendors were members of the AFSA. Not all potential vendors were members of the AFSA or part of the funeral services industry.

By July 10, 2014, the OCME reported receiving 25 responses. Five (5) vendors met the requirements and signed contracts and 19 of the responses were in the procurement process pending completion. The OCME reported of the top five (5) transportation of deceased person service providers, accounting for 54% of transportation costs, two (2) had signed contracts with the department and two (2) others were in the process of review.

Concerns raised by the AFSA

The AFSA represents funeral home service providers in Alberta. All funeral home service providers are not members of the AFSA, and there are other associations in Alberta representing funeral service providers. At the time in question, there were 95 rural funeral service providers in Alberta with 74 being members of the AFSA (78%).

On April 26, 2014, members of the AFSA passed a motion at an annual general meeting rejecting the contract in the standing offer. The AFSA asked its members to collectively stand together and not sign a contract with the department. There was not unanimous support of this decision. Some funeral service providers were prepared to submit responses to the standing offer and enter into contracts with the department had the AFSA not intervened. There was an inconsistent understanding of the standing offer and the procurement process. It was viewed by some members as a contract with the department imposed on them as opposed to a public procurement.

The AFSA wrote to the CME advising of the motion to reject the contract and attached 50 letters from funeral homes indicating they would not sign the contract. Of the 25 companies who originally submitted responses, 14 subsequently sent letters advising they would not sign. The AFSA requested a meeting with the CME. In consultation with procurement officials, the CME declined the AFSA's request and asked it outline its concerns in writing. The AFSA responded to the CME outlining its concerns and specifically that the compensation was restricted to a one-time $300 fee.

The AFSA warned the department a work stoppage would occur unless it changed the terms and conditions in the standing offer. The AFSA and its members lobbied the department and initiated a letter writing and email campaign to various MLAs, Ministers and other stakeholders, opposing the standing offer. On May 20, 2014, the Minister was first notified by a fellow cabinet member the AFSA was not willing to transport deceased persons under the terms of the standing offer.

On June 12, 2014, the Minister responded to the AFSA. The Minister supported the initial standing offer and the fee structure outlined within and advised it was up to individual companies whether they would like to apply for the new contract. The AFSA responded to the Minister warning of drastic action by transportation service providers and requested a meeting. The AFSA advised there would be a withdrawal of non-contracted transportation services across the province. There was a concern and fear in the department that if no one signed the contract, no one would be transporting deceased persons.

The decision to revise the standing offer

On July 2, 2014, the Minister, DM and ADM met with the AFSA. The CME was not included in the meeting and there were no minutes taken or official record of the meeting.

The outcome of this meeting and how it was communicated to department staff is inconsistent. It was generally established the Minister committed to the AFSA to have the department review its concerns with the standing offer. The DM advised following this meeting they formed the opinion the standing offer was flawed and gave direction to the ADM to meet with the AFSA and determine if a mutually acceptable compromise could be achieved. However, the ADM believed the Minister's commitment to review the standing offer automatically meant adjustments would need to be made to the standing offer and it was implied this would involve working with the AFSA. The ADM subsequently communicated to the CME and other department staff the Minister had committed to have the contract terms adjusted, and Minister direction was guiding the process. The ADM later miscommunicated the involvement of the Premier's office to the CME when explaining the need to resolve the issues with the AFSA; the

Premier's office was briefed by the department but was not directly involved in this matter. This miscommunication resulted in the perception of political interference in the procurement process by the CME.

The process used to revise the standing offer

The department established a working group comprised of the CME, the ADM, the Director of the procurement branch, along with executive and members of the AFSA and three people representing two other industry associations. The three people representing the two other industry associations did not participate to the conclusion of the revision process. The ADM was tasked with leading the working group.

The CME was opposed to revising the standing offer and meeting with the AFSA. The procurement branch also recommended against revising the standing offer citing it would not be fair to the existing successful vendors if the department modified the standing offer, and perceived legal risks with doing so. They recommended keeping the standing offer open for at least one year. Procurement cited it was the choice of the vendor community whether or not they want to accept the contract work by submitting their qualifications in accordance with the procurement process. In an email, the Director of procurement wrote: "*if we allow the vendors to dictate what should be in a contract then we may not be protecting our assets/program*".

The recommendation was not followed. The department recognized revising the standing offer in this manner was not best contract and procurement practice; however, it was believed the Minister committed to adjusting the terms of the standing offer.

The working group initially met on July 23, 2014. The department described the intent of the meeting as: "*work toward consensus on issues including body transportation contract terms identified during the meeting held on July 2, 2014 between AFSA and (the Minister)*". The CME was perceived as being inflexible during the initial meeting.

On July 28, 2014, the department gave the CME a letter of expectation which directed the CME to work with the ADM to reach a resolution regarding the standing offer.

The department subsequently negotiated and collaboratively revised terms and conditions in the standing offer with the AFSA through working group meetings and by email. In relation to compensation, the AFSA sought the $300 transportation fee for each leg of transporting a deceased person, up to three (3) legs.

On September 17, 2014, the CME prepared a briefing note for the Minister, recommending against revising the standing offer. It was estimated the revisions would amount to between 160% to 176% increase in the flat fee costs and a 39.82% increase in mileage costs. The CME estimated an additional $950,000 in budgeting would be required to accommodate the fee changes. The briefing note was not approved by the ADM and was not forwarded to the Minister.

On September 25, 2014, the ADM moved to another department and an acting ADM was appointed to the division and assumed responsibility for revising the standing offer.

A subsequent analysis conducted by the Divisional Finance Director for Justice Services Division estimated maintaining the original standing offer could potentially result in $100,000 to $300,000 savings in the 2014-2015 budget, whereas the proposed revisions would result in an estimated cost increase at a maximum of $480,000. This indicated a cost variance of between $580,000 and $780,000.

On October 7, 2014, the AFSA advised the department it was considering withdrawing services and contacting the media and opposition parties if a resolution was not imminent. The AFSA planned on its members voting on a service disruption.

The acting ADM revised the briefing note to the Minister and recommended a return to a compensation scheme that provided vehicle fee remuneration for multiple legs, resulting in a potential budget impact of $480,000. This was the compensation scheme requested by the AFSA and returned to the practice in place prior to the standing offer. The recommendation was approved by the Minister. The Director of the procurement branch was instructed to work collaboratively with the AFSA on wording in the revised standing offer.

The CME subsequently removed themselves as the contract manger and expenditure officer citing their disagreement with the revisions to the standing offer. Final revisions to the standing offer were made without the input or approval of the CME or the OCME.

A department official advised the AFSA did not dictate what was going to be put in the contract; however, by refusing to provide services they "*drove the program*" and the department was "*held hostage*". They believed funeral service providers were not going to pick up deceased persons.

The department sent the revised standing offer to the AFSA for its approval in advance of posting it for public tender. The clearance sheet authorizing the procurement stated the AFSA "*signed-off*" on the revised standing offer. This indicates the AFSA was involved in the final approval of the procurement by the department.

The revised standing offer was posted on the Alberta Purchasing Connection website on November 14, 2014. The initial standing offer remained active while it was being revised, and was removed the day prior to the revised standing offer being posted.

The outcome of the revised standing offer

The primary changes in the revised standing offer included:

- A requirement for the OCME to pay additional fees for transportation in the event the contractor must leave and return or if the deceased person must be stored at the contractor's location before being delivered. This was a return to a compensation structure that provided the $300 fee for each leg of a trip, up to three (3) legs;
- A requirement for the OCME to transport a deceased person to an alternate location, other than the place of death, at the request of the next of kin. This amount was to be paid up to or less than the amount that would have been given had the deceased person been returned to the place of death;
- A requirement for contractors to submit invoices within 30 days of service rather than monthly invoices;

- The requirement for the OCME to replace and reimburse the contractor for body bags;
- The removal of the requirement for contractors to provide a fidelity bond; and
- The removal of the requirement for subcontractors and agents of the contractor to have a criminal record check.

There was lack of clarity in the department on how to process claims from service providers using the revised contract. A guide was subsequently prepared identifying 21 different payment scenarios. Based on the variables identified, the cost variance ranged from $344.48 to $1,223.78 for transporting a deceased person. This guide was approved by the current CME on May 11, 2015 – nearly six months after the implementation of the revised standing offer. Funeral home service providers have also advised of ongoing issues indicating the revised contract is not being administered properly.

The department reported overall costs for rural body transportation services did not increase with the revised standing offer. However, the department continues to retain both contracted and non-contracted service providers, and the department had not yet operated a full fiscal year under the new contract using the new payment structure.

Conflict of interest and political motivation

The investigation found the Minister had no financial interest in the funeral service industry. No donations from the funeral services industry were made to constituency associations where the Minister was an MLA. No evidence of a conflict of interest was noted. The investigation also concluded the funeral service industry has not made substantive donations to any particular political party, political candidate or constituency association. Donations from the funeral services industry to the political party in power at the time accounted for 0.43% of all donations to the party since 2004. Notwithstanding a relatively small electorate within the funeral services industry, there was no evidence supporting the allegation the actions by the Minister were politically motivated.

Analysis

In the Government of Alberta, the procurement of services is performed by each individual department. The department reported following the "Accountability Framework for Acquiring Goods and Services" at the time of this issue. This framework was subsequently replaced by the "Procurement Accountability Framework" established April 1, 2015, to ensure consistent procurement process across government. Both frameworks require departments follow the principles of integrity, fairness, transparency and openness during the procurement process.

The guiding principles for procurements as described by a procurement official within the department were:

1) Being fair, transparent, and treating all vendors equally;
2) Issuing documentation fairly with no one vendor having an advantage over the other; and
3) Procurement documents are to deliver the services requested by the program area (the end-user of service).

In considering these principles, the department was not transparent during the procurement process. Although the AFSA may have represented the interests of a large portion of potential vendors, it did not represent the interests of

every funeral home service provider in the province or potential vendors who were not part of the funeral services industry. During the revisions, the procurement remained active for public tender and the department did not advise potential vendors of the consultation with the AFSA. In this regard, the department was not transparent.

The revised terms and conditions in the standing offer, however, did not preclude any potential vendor from applying. In some ways, the revisions may have increased a response from the vendor community. In this regard, the procurement process was fair and all vendors had an equal opportunity to respond to the standing offer. Although the CME may not have agreed with the revised standing offer, the procurement ultimately delivered the services requested.

The Minister met with the AFSA on July 2, 2014. This meeting ultimately resulted in the perception by the AFSA and the department that the terms in the standing offer would be adjusted, and this would be done collaboratively with the AFSA. Therefore, the procurement process was influenced – intentionally or not.

In an unrelated public inquiry into external contracts awarded by the City of Toronto (the Bellamy Report), Honorable Justice Denise E. Bellamy cited meeting with bidders and/or lobbyists after a request document (standing offer) has been released as poor practice on the part of individual elected officials. The Bellamy Report identified the best practice of elected officials declining meetings with bidders/lobbyists at an even earlier stage, i.e., once a certain stage has passed in the request document development process. The Bellamy Report also cited, as a poor practice, elected officials entertaining complaints from bidders and/or their lobbyists with respect to a current or closed completion instead of, as a matter of course, referring the complaint to the appropriate internal complaints resolution process. The Bellamy Report concluded the best practice approach to dealing with political involvement during the competitive process is to establish the expectation that vendors and their lobbyists/agents will only communicate with the designated procurement official.[1]

It is a best practice principle for procurements to be led by those with education, experience and qualifications in procurement.[2] In this case, however, the process of revising the standing offer was led by the ADM. A senior procurement official initially advised the department against revising the standing offer and warned of the risks in doing so. The department, however, decided not to follow this advice and continued with the process of collaboratively revising the standing offer with the AFSA.

The impact of this issue to the OCME and the department is not clear. The financial impact is not accurately quantifiable as it cannot be predicted how many persons will perish and where. It is generally accepted, and the department has acknowledged, the revisions to the initial standing offer may increase costs for the transportation of deceased persons; however, the department has reported no increase in transportation costs since the implementation of the revised standing offer and it is monitoring costs.

Transportation of deceased person services continues to be provided and there is no indication the revised standing offer affected the OCME's ability to investigate and certify deaths in Alberta.

[1] **Report of the Commission of the Toronto Computer Leasing Inquiry and the Toronto External Contracts Inquiry** September 12, 2005, by the Honourable Madam Justice Denise E. Bellamy. Volume 2: Good Government. P 892 – 893.
[2] **Values and Guiding Principles of Procurement** 2012, The Chartered Institute of Purchasing & Supply and the National Institute of Governmental Purchasing

Conclusion

The procurement practices by the department in relation to this standing offer were poor; however, the department made the decision to revise the standing offer based on what it believed was in the public interest. Although the services for transporting deceased persons may have cost more as a result of the revised standing offer, it was believed the consequence of not revising the standing offer could have had a more significant impact on the public – i.e., there would be a lack of service providers available to transport deceased persons. The department's actions were not illegal and there is a lack of evidence supporting the assertion the decisions were politically motivated. The department's actions did not exhibit a reckless or willful disregard for the efficient management of significant government resources; rather, the actions were based on a legitimate concern that service providers would not be available to transport deceased persons. Therefore, the actions of the department do not meet the threshold of gross mismanagement, and do not result in a finding of wrongdoing as defined under the Act.

The allegation of interference by the department in contravention of the *Fatality Inquiries Act*

Process of Investigation

The over-arching dispute between the CME and the department related to the degree of independence the OCME and the CME has from government. The investigation of this issue did not seek to establish the degree of independence the CME should have from government. Rather, the investigation sought to determine whether actions by the department constituted interference with the statutory duties of the CME in a manner which contravened the *Fatality Inquiries Act*.

Section 24 of the *Fatality Inquiries Act* relates to an offence under this statute:

> **Offence**
> ***24*** *A person who hinders, obstructs, intimidates or in any way interferes with a medical examiner or an investigator in the performance of the medical examiner's or investigator's duties is guilty of an offence.*

The offence provision establishes a two-part test:

1) The actions of the department must have either hindered, obstructed, intimidated or interfered with the CME; and
2) The actions must have been during the course of the performance of the CME's duties as a medical examiner.

It was not practicable to examine all policy decisions and interactions the department had with the CME or the OCME to determine if interference occurred. Due to the broad nature of the allegations, the investigation scope

was limited to the specific allegation made against the ADM, and the actions by the department in relation to its involvement in the standing offer for the transportation of deceased persons. The investigation sought to determine if these actions hindered, obstructed, intimidated or interfered with the CME in the performance of their duties as a medical examiner.

Facts of the Investigation – In relation to allegations of interference by the department

The structure of the OCME within the department

In Alberta, the CME is a public official appointed by the Lieutenant Governor in Council under the *Fatality Inquiries Act*. The OCME has historically been part of the department. The CME is an employee of the department.

In May 2011, the Justice Services Division was created within the department. This division amalgamated several branches, including the OCME.[3] This subsequently required the CME to report to an ADM. Following the appointment of the CME on July 1, 2011, there was also a complete change in the department's executive. The CME was not reporting to the same executive the former CME was. Further, a new ADM of Justice Services Division was appointed on May 12, 2014.

The role established for the CME by the department

As addressed in the first allegation, the CME disputed the decision to revise the standing offer for the transportation of deceased persons. There was disagreement between the CME and the ADM regarding what direction meetings with the AFSA should take.

There was a lack of clarity regarding the respective roles and legal relationship between the CME and the department, and the degree of independence the CME has from the department. The ADM and the CME agreed to a roles clarification project to clarify their respective roles. It was agreed this would be a collaborative process and would involve the legal branch.

The CME was subsequently given a "Memorandum – Mandate and Roles" document (the memorandum) specifying the role of the CME in relation to the department. The CME did not participate in creating this memorandum. The CME disagreed with provisions in the memorandum and requested further legal clarity.

At the time the CME was appointed, a management job description was in place which outlined the roles and responsibilities of the CME. The memorandum conflicted with the management job description, particularly regarding who was the ultimate decision-maker in policy matters relating to death investigations. Management job descriptions are subject to change as a result of a realignment of responsibilities or a change in the way a service is

[3] Alberta Justice and Solicitor General Annual Report 2012 - 2013

delivered.[4] However, a human resource services executive advised expectations cannot be set for an employee that conflict with their job description. If there is a drastic change, the government's practice is to amend the job description as required. In this case, the CME's management job description was not amended to align with the memorandum.

The CME also received two draft legal opinions by the department. The CME sought clarity on the opinions from the legal branch; however, reported not receiving a response to their questions. The CME was subsequently provided a letter of expectation with the final versions of the memorandum and legal opinions. The letter required the CME to adhere to the legal opinions and memorandum. It also required the CME to participate in the process of collaboratively revising the standing offer with the AFSA.

The letter of expectation ended the roles clarification project. The department acknowledged the CME was still expecting clarity from legal services when the letter of expectation was given. No collaboration between the department and the CME occurred from the time the draft memorandum and legal opinions were given, to the time the CME was given the letter of expectation. The process used by the department to clarify the role of the CME created animosity and distrust by the CME.

The department's response to the CME's concerns

On July 31, 2014, the CME wrote to the Minister requesting authorization to obtain an independent legal opinion examining the current state of independence of the OCME. The CME subsequently drafted a briefing note to the Minister reporting the OCME was independent until 2011 when the Justice Services Division was created. The CME advocated for independence on all matters and policy related to death investigations. The briefing note was reviewed by the DM; however, ultimately did not proceed to the Minister.

The DM did not support the CME's position and advised that the OCME, as part of the department, cannot operate arms-length from it. This was contrary to the CME's understanding or their role, and contrary to department records and public reports. Specifically, the CME relied on:

- An intranet page for the Justice Services Division which described the OCME as operating arm's length from the ministry;
- A public media release by the Premier at the time which identified the OCME as "*independent*"; and
- A public report from a Child Intervention Roundtable conducted by the Minister of Human Services at the time, relating to changing the way child death reviews are conducted. The roundtable consisted of 579 participants including the Premier at the time, the DM of the department, executives from other departments, and several other entities including legislative offices, agencies, boards, commissions, post-secondary institutions and first nations groups. The final public report stated the OCME "*operates at arms [sic] length from the government*".

[4] Government of Alberta - Management Job Description Writing Guide

The department reported the references to "*arm's length*" and "*independence*" in the publications above was limited to death investigation findings; specifically decisions on cause, manner and circumstances of a death investigated under the *Fatality Inquiries Act*.

The CME further addressed their concerns with the process of revisions to the standing offer with the DM. The DM did not support the CME's concerns, citing the admission and release of bodies did not fall within the OCME's area of authority and involvement by the department did not constitute improper interference.

Analysis

In relation to the degree of independence of the Alberta CME

The degree of independence of government decision-makers was addressed in *Ocean Port Hotel Ltd.* v. *British Columbia,* [2001]. The Supreme Court of Canada decision stated "*The degree of independence required of a particular government decision maker or tribunal is determined by its enabling statute*".[5] Therefore, the degree of independence the CME has from government is determined by our elected officials through legislation.

There is no specific reference to independence or autonomy of the CME in the Alberta *Fatality Inquiries Act*. The *Fatality Inquiries Act* outlines the CME's responsibilities in section 5. This section does not specifically give the CME responsibility for the administrative aspects of the OCME.

In consideration of this issue, the CME referenced two public reports:

1) A July 5, 2011 report from the Auditor General of BC titled "British Columbia Coroners Services"; and
2) A report from a provincially commissioned inquiry into Pediatric Forensic Pathology in Ontario, and a supporting study titled "Accountability and Oversight for Death Investigation in Ontario".

Both reports support the need for independence in the respective provinces' Coroner's service. However, both provinces operate under a different statutory scheme than Alberta. Specifically, the Alberta *Fatality Inquiries Act* lacks a provision which would give the Minister the ability to assign (delegate) additional duties to the CME, further to those specifically stated in the statute. Moreover, there is no implicit indication the Government of Alberta delegated any powers over administration of the OCME to the CME. Therefore, the CME does not have delegated authority over the administration of the OCME and the department's involvement in the administration of the OCME is not contrary to the *Fatality Inquiries Act*.

In relation to the offence provision of the *Fatality Inquiries Act*

The offence provision establishes a two (2) part test:

[5] *Ocean Port Hotel Ltd. v. British Columbia,* [2001] 2 SCR 781 at paragraph 20 - 24

1) The department's actions must have either hindered, obstructed, intimidated or interfered with the CME; and
2) The actions must have been during the course of the performance of the CME's duties as a medical examiner.

This provision requires an action interfere with the performance of a specific duty of a medical examiner. Section 19 of the *Fatality Inquiries Act* outlines the specific "duties" of a medical examiner. A medical examiner investigates a death to establish where possible – the identity of the deceased; the date time and place of death; the circumstances under which the death occurred; the cause of death and the manner of death. The medical examiner also has a duty to keep records, report investigations to the CME and complete a medical certificate of death. The procurement of services for the transportation of deceased persons is not a defined "duty" of a medical examiner.

The *Fatality Inquiries Act* authorizes the CME to perform the duties of a medical examiner. The CME does not have specifically defined "duties" in the *Fatality Inquiries Act* which would apply to the offence provision.

Conclusion

The procurement of transportation of deceased person services is not a defined duty of a medical examiner in the *Fatality Inquiries Act*. The procurement of services is an administrative function of the department. The *Fatality Inquiries Act* does not give the CME authority over administration of the OCME. Therefore, the actions of the department in assuming control of the procurement for transportation of deceased persons did not interfere with the CME in a manner which contravened the *Fatality Inquiries Act*.

Facts of the Investigation – In relation to allegations of interference by the ADM

In July 2014, the Premier at the time while acting in the capacity of an MLA, wrote to a medical examiner on behalf of a constituent seeking a review of a death investigation. The letter was on letterhead for the Premier of Alberta.

Constituency requests to the department are normally processed through the Government of Alberta's Action Request Tracking System (ARTS). The letter did not follow the usual process.

The letter was forwarded to the CME. The CME forwarded the letter to their supervisor, the ADM of Justice Services Division, alleging interference and seeking advice on how to approach the situation. The ADM asked the CME to prepare a response.

The CME intended to send the letter directly to the Premier based on the OCME procedure for responding to constituency requests for a review of a death investigation.

The ADM instructed a temporary assistant to follow-up with the CME and determine the status of the letter. When it was determined the letter was being sent by mail directly from the OCME, the ADM informed the temporary assistant of the department's correspondence protocol which required the response to be processed through ARTS.

The temporary assistant contacted the OCME and spoke with an employee. The employee stated the temporary assistant asked her to remove the letter from the mailbag and shred it. The employee removed the letter; however, did not destroy it. The employee subsequently notified the CME of the request.

The CME contacted the ADM about the communication and alleged this interfered with the operations of the OCME. The ADM subsequently asked the temporary assistant what transpired. The temporary assistant responded, in part: "*I told [employee] to discard her version as we could not send the letter from [the CME]* …."

The ADM responded to the CME explaining the administrative rule requiring the response to the constituent to be from the Minister and to be processed through the ARTS system. The ADM did not address the CME's concern the OCME staff member had been instructed to shred the letter.

Analysis

There is no indication the ADM gave any instructions to destroy or shred the CME's letter. This misunderstanding was the result of miscommunication. There is no indication the CME's letter was altered prior to it being sent.

There were two conflicting processes triggered by the letter from the Premier. The CME had an established procedure for responding to requests for a review of a death investigation; the letter from the Premier was such a request on behalf of a constituent. Conversely, the department had a correspondence protocol for responding to requests from MLAs through ARTS. Therefore, the department wished to follow this process. As the letter to the OCME did not follow the usual department process, it would reason the CME would respond using the OCME procedure.

The distribution of correspondence by the CME is not a defined "duty" of the CME under the *Fatality Inquiries Act*. The process for responding to requests for a review of death investigations was a procedure established by the OCME. Correspondence protocols are established by the department and the CME is an employee of the department. The correspondence protocol also applies to all other public officials within the department.

Conclusion

The CME may have been prevented from sending a letter to the Premier using their own internal procedure; however, this was not done in a manner which contravened the *Fatality Inquiries Act*. Therefore, the actions of the ADM were not wrongdoing as defined by the Act.

The complaint of reprisal

Process of investigation

The CME was employed under a fixed term contract of employment. A decision not to renew or extend a term employment contract is not a dismissal of employment; employment ends at the expiration of the term. No action is required to terminate a fixed term contract and an employer is under no obligation to renew the contract of employment.

If, however, a promise to renew a fixed term contract occurred and the failure to renew the contract in accordance with the promise was directly the result of an employee's disclosure of wrongdoing in accordance with the *Public Interest Disclosure (Whistleblower Protection) Act*, such action may be considered a reprisal.

In its current form, the *Public Interests Disclosure (Whistleblower Protection) Act* requires a disclosure to be made to either the designated officer for the department or to the Public Interest Commissioner for protection provisions to apply. Reporting a wrongdoing to an alternate external body or to an internal authority is not a protected disclosure.

Therefore, the investigation sought to determine:

1) If there was a specific promise by the department to renew the CME's fixed term contract; and
2) If the decision not to renew the CME's contact of employment was specifically linked to the CME reporting alleged wrongdoing to the Public Interest Commissioner.

The department reported the decision not to renew the CME's contract of employment was a reasonable human resource management decision made in good faith. The investigation therefore considered the human resource management decisions made by the department.

Facts of the Investigation

The CME's performance history

The CME commenced their employment with the department on August 17, 2009, as an Assistant Chief Medical Examiner. They were promoted to Deputy Chief Medical Examiner for the Edmonton office in August 2010 and subsequently appointed Chief Medical Examiner effective July 1, 2011. The CME was hired under a fixed term contract of employment, which expired on June 30, 2014. The employment agreement did not include a renewal provision. The contract contained a provision which confirmed that there were no other promises or guarantees made outside of the written agreement.

The department reported there were a variety of general concerns about the CME's leadership and competence as a manager during their tenure. However, between the date of the CME's initial hire to the OCME and April 17, 2014, the CME had five (5) performance assessments conducted by supervisors – three (3) as CME. The CME's performance was rated either superior or outstanding. The CME's assessments referred to the CME as "*an enormous asset to the Government of Alberta*", citing significant success, the respect and trust of their colleagues, and being an outstanding CME. There was no indication of leadership, competence, performance or management issues in the CME's performance assessments.

A new ADM was appointed to Justice Services Division on May 12, 2014 and remained until September 2014. There was no record of disciplinary action, performance or management issues with the CME prior to this appointment. The breakdown in the relationship between the department and the CME followed.

The CME did not violate any law, regulation, directive, rule or policy of the department during their tenure at the OCME.

Assurances by the department to renew the CME's contract of employment

In March 2014, the CME received an assurance from the Deputy Attorney General of the department's intention to renew the CME's contract of employment when it expired; however, no specific details were provided. The employment contract templates for medical examiners were being revised at the time, and as a result of delays in this process the CME received an employment contract extension until January 1, 2015.

An ADM of Justice Services Division also agreed with a proposal to renew the CME's contract of employment for five (5) years provided it met with the approval of the DM; however, there were no conclusive records stating the DM specifically approved the CME's request for a renewed contract.

Complaints against the CME

The department reported there were a number of internal and external complaints to department leadership regarding the CME's management style and judgement. It was reported complaints were received through MLAs and OCME staff.

There was no record of formal complaints made against the CME. Allegations were made against the CME informally through anonymous letters to MLAs, and through exit interviews from two (2) employees.

Former and current employees of the OCME who were interviewed all recognized a change in management style between the CME and the former CME. Some employees reported concerns with the CME's management style. Other employees felt there were issues with staff at the OCME, and the CME was trying to affect change and accountability for the better. Some employees described a resistance to change by staff and one (1) interviewee described staff being antagonistic towards the CME. Department records found issues with some staff at the OCME and reports of ongoing dysfunction in one particular unit.

Interviews with employees found there were no concerns regarding the CME's professional standards, ethics or competency as CME.

The informal complaints against the CME were not substantiated. There is no record of an investigation or impartial review into any of the allegations made against the CME in order to establish their merit. The CME was not afforded an opportunity to formally respond to the allegations. The department advised investigations are only conducted into formal complaints, and the CME was not provided information about the complaints or given an opportunity to respond because the complaints were not formal.

The ADM advised some of the information in the complaints was incorrect and highly overstated. Notwithstanding, the ADM advised it was believed staff were leaving because of the CME; however, a review of department records found an equal number of staff (5) left the OCME in the four (4) months following the CME's departure compared to the last year of the CME's tenure.

The department's management of the CME

As addressed in the first allegation, the department decided to collaboratively revise the terms and conditions of the standing offer with the AFSA. The CME disputed this decision and was adverse to negotiating with the AFSA and revising the standing offer. The CME's disagreement was considered a human resource issue by management.

As addressed earlier in this report, the CME was provided a memorandum and two (2) legal opinions as part of a roles clarification project. The documents were given to the CME together with a letter of expectation. The letter initially stated: "*You have requested clarification of the role and independence of the office of the Chief Medical Examiner*"; however, subsequently expressed concerns about the CME's interactions with the ADM and others. The letter of expectation required the CME to comply with the legal opinions and to participate in the process of revising the body transportation standing offer.

The letter of expectation further cited a corporate employee survey showing areas of concern in the OCME. These issues were attributed to the CME; however, there was no link between the survey results and the CME's performance as CME.

The ADM and Human Resource Services (HRS) staff collaborated on how to manage the CME. Consultants with Organizational Design and Effectiveness (ODE) within HRS provided regular updates to the ADM in relation to their observations of the CME. This created distrust by the CME as the ODE group was also working on the organizational design and development plan for the OCME. Records also found a consultant with HRS was encouraging an employee to make a formal complaint days after the letter of expectation was provided to the CME, and HRS staff were seeking comments about the OCME from external parties.

The ADM had direct lines of communication with HRS staff as needed, and staff may have taken direction directly from the ADM in relation to the performance management of the CME.

The CME wrote to the Minister advising of their concerns regarding the independence of the CME and OCME. The CME specifically asked for the Minister's help in "*ensuring the CME can speak up to higher staff in the Government of*

Alberta about issues threatening the system without fear of retaliation and reprisal." On August 12, 2014, the CME subsequently prepared a briefing note for the Minister suggesting the lack of independence of the OCME threatened the integrity of the death investigation system in Alberta.

The DM responded to the letter and briefing note, and required the CME to follow the letter of expectation. The briefing note did not proceed to the Minister.

The CME subsequently filed a disclosure of wrongdoing with the Public Interest Commissioner. The following day, the CME notified the department of their disclosure of wrongdoing to the Commissioner; however, did not provide details. In subsequent correspondence to the DM, the CME clarified the disclosure related to the operational independence of the OCME.

The DM responded to the CME indicating the disclosure to the Commissioner would be dealt with separately from the performance management of the CME. The DM noted the performance management predated the complaint to the Commissioner. The CME advised the performance management involved management concerns unrelated to the CME's issues regarding independence. The DM instructed the ADM to continue the performance management of the CME as outlined in the letter of expectation.

The decision not to renew the CME's contract of employment

On September 18, 2014, the ADM met with the CME and advised their contract of employment would not be extended due to concerns with the CME's communication with human resource representatives and the delay in the CME finding an executive coach. The CME cited a lack of trust with the ADM and human resource representatives and reported still having no clarity on roles and degree of independence the CME has.

On September 23, 2014, the CME wrote to the Premier. The CME requested the Premier's help and reported their concerns relating to perceived interference in the independence of the OCME, and concerns regarding revisions to the standing offer.

On September 24, 2014, the Premier wrote to the Minister requesting a review of the allegations of political and bureaucratic interference made by the CME, and a recommendation on how to proceed. The Premier cautioned the Minister on the principle that subjects of the investigation cannot be seen to investigate themselves. Despite this caution, the ADM who was included in the allegations made by the CME, prepared a briefing note for the Premier on September 25, 2014. The briefing note also addressed the performance management of the CME. The briefing note gave incomplete or inaccurate information relating to the transportation of deceased person's standing offer and complaints made against the CME. Specifically:

- The briefing note directed blame for the issues with the initial standing offer onto the CME; however, the standing offer was prepared and tendered utilizing the appropriate procurement process and was subject to review and approval by legal and procurement branches. Moreover, the initial standing offer was approved by the DM prior to posting for public tender.
- The briefing note reported the complaints against the CME; however, the allegations were unsubstantiated. Moreover, the ADM reported the complaints despite acknowledging some information in the complaints was incorrect and "*highly overstated*".

- The briefing note did not identify the standing offer as a public procurement; rather it was represented as a contract with the AFSA implemented by the CME.

The briefing note provided two options for the Premier:

> *Option one is to allow the complaints that have already been made to run their course and for the human resource concerns (performance management) to be dealt with separately. This would result in the CME being notified that [their] contract is not being extended past December 31, 2014. As well, now that the RCMP have determined that there is no potential criminal conduct that merits investigation, the Public Interest Commissioner (PIC) will commence his review of the allegations.*
>
> *Option two is that given that the complaints are against the Minister and the Deputy Minister as well as other department staff, an external third party (such as a retired Judge or Justice from Alberta) be appointed to review the complaints of interference with the independence of the CME. The review should not extend to an examination of the performance management of the CME.*
> *If an external third party is appointed to review the matter, then precautions will have to be taken to avoid any actual or perceived conflicts.*

The briefing note was provided to the Premier. There is no record of approval; however, ultimately option one was implemented by the department.

The department reported the briefing note for the Premier was prepared on extremely short notice (less than two (2) hours) and at a time when scant information had been provided to the department about the substance of the alleged political and bureaucratic interference. Notwithstanding this, a formal review of the allegations was not undertaken as the department was of the view the allegations were without merit. The briefing note ended the review of the CME's allegations of interference.

On September 26, 2014, a letter from the Premier was faxed to the CME. The letter advised "*I understand that you have been in contact with the Public Interest Commissioner and that this office is assessing your allegations. As this is the correct process and it is underway, I regret that I am unable to intervene nor respond to your request for review*". Three (3) hours after this letter was faxed, the CME was emailed a letter from the DM advising their contract of employment would not be renewed following its expiration on January 1, 2015. No reason for the non-renewal was provided.

The department reported the decision to not renew the CME's contract of employment was made by the DM. The DM reported notice was given on September 26, 2014, in order to provide three (3) months' notice prior to the expiration of the employment contract. The DM reported the CME held a belief that their powers as CME exceeded those prescribed in law and interacted poorly with staff and stakeholders.

Once the department made a decision to not renew the CME's contract of employment, the Minister took steps necessary to cause the Lieutenant Governor to issue an Order in Council rescinding the appointment of the CME, effective January 1, 2015. This is the required process when a decision is made not to renew or extend the appointment of a statutorily appointed official.

The CME's contract of employment expired January 1, 2015 and was not renewed.

Analysis

To determine if a reprisal occurred, investigation of this issue sought to verify:

1) If there was a specific promise to renew the CME's fixed term contract; and
2) If the decision to not renew the CME's contract of employment was specifically linked to the CME reporting wrongdoing to the Public Interest Commissioner.

If there was a promise to renew the CME's contract of employment

The CME's employment agreement did not include a renewal provision. There was no guarantee of renewal. The CME's employment ceased at the expiration date of the agreement.

The department initially gave assurances by email of its intention to renew the CME's contract of employment; however, no specifics or details were provided. The CME requested a renewed contract for five (5) years, which the CME's supervisor agreed to subject to approval of the DM. There were no conclusive records stating the DM specifically approved the CME's request for a renewed contract. A September 26, 2014 letter notifying the CME their contract would not be renewed reflects the department's final decision on this issue.

If the decision to not renew the CME's contract of employment was linked to reporting wrongdoing to the Public Interest Commissioner

For a reprisal to have occurred, the adverse employment action must have occurred specifically as a result of a disclosure made to either the designated officer for the department or to the Public Interest Commissioner. Reporting a wrongdoing to an alternate external body or to an internal authority is not a protected disclosure. Therefore, the internal complaints the CME made to the department do not constitute a protected disclosure under the Act.

The CME made the disclosure of wrongdoing to the Public Interest Commissioner on August 18, 2014, and notified the DM the following day. The department had already initiated performance management measures against the CME involving HRS in July 2014 – prior to the department becoming aware of the disclosure. These performance management measures were ultimately relied on as the reason to not renew the CME's contract of employment.

The decision to not renew the CME's contract was made following the CME's letter to the Premier on September 23, 2014. The Premier was provided a briefing note with two options – one of which would result in the CME's contract of employment not being renewed. Ultimately, this was the option implemented immediately afterwards by the department.

The DM reported the decision was not the result of the letter to the Premier, rather it was based on timing – September 26 was essentially the last day notice could be given in order to provide three (3) months' notice of the department's intention not to renew the contract.

There were no records, statements made by witnesses, or any other evidence found to link the decision to not renew the CME's contract of employment to the action of the CME making a disclosure to the Public Interest Commissioner.

Conclusion

The department did not commit a reprisal, as defined under the Act, by not renewing the CME's contract of employment. Although the decision not to renew the CME's contract of employment was made after the disclosure to the Commissioner, there was no conclusive evidence linking the disclosure as the specific reason for the decision. The evidence supports the decision was a human resource management decision resulting from a strained relationship between the CME and the department. This discord existed prior to the disclosure of wrongdoing. Therefore, the balance of probabilities favours the department.

Observations

In cases where a finding of wrongdoing is supported, the Commissioner may make recommendations to assist departments to address the matter appropriately and advance public confidence.

In circumstances where wrongdoing as defined by the Act is not found, yet a practice or action is identified as not right, observations identified through our independent investigation are documented for the benefit of the department to consider and implement changes if deemed appropriate. Observations are not monitored in the same manner as recommendations. The Commissioner communicates his observations to public entities to enable the public entity to remedy what might otherwise become a wrongdoing under the Act if they were to continue.

Eight (8) observations are being made from this investigation.

In relation to the allegation of gross-mismanagement of public funds

1. The process the department used to revise the standing offer was poor and not best practice. Hearing the concerns of an industry group representing the interests of a large portion of potential vendors may be prudent; however, if the standing offer was deemed flawed, the department ought to have cancelled and removed it from the Alberta Purchasing Connection. Negotiating and collaboratively revising the terms and conditions of a standing offer with potential vendors during an active solicitation is inappropriate. Moreover, external entities should not be part of the approval process for a public procurement by the government. The department's decision to negotiate with the AFSA presented a risk to the department and the Government of Alberta in general. It could be seen to establish an expectation and set an example for future procurement of transportation of deceased person services and for future procurements of other products and services. The department needs to distinguish between legitimate lobbying and interference in a public procurement process.

2. Those responsible for procurements, through the use of public funds, have a responsibility to the department, the Government of Alberta as a whole, and the public, to protect the assets of the department and maintain the integrity of the procurement process. Procurement officials are also responsible for educating department decision-makers on the appropriate procurement process and intervening when a deviation occurs. In this case, those responsibilities were not met.

3. The department has reported at the time of this issue it followed the "Accountability Framework for Acquiring Goods and Services", and since April 1, 2015, has implemented the "Procurement Accountability Framework" (PAF) established to support consistent procurement practices across government. The department reported it has also developed some of its own procurement guidelines and procedures which support the PAF, and other department-specific resources are currently at various stages of development and approval. The investigation found internal department contract policy and procedures related to best practices in the procurement of goods and services were incomplete. The department ought to conclude developing and implement outstanding policies and best practice guidelines to ensure future procurements do not proceed in such a highly irregular fashion.

4. Elected officials need to be cautious when considering requests to meet with potential vendors or lobbyists during an active procurement process. Political involvement in the procurement process ought to be limited to the front-end role of policy decisions, ensuring purchasing infrastructure exists, pre-approving the organizations purchasing requirements as part of the overall budget process, and approving any purchasing needs that exceed approved budgets.[6] Further, where Ministerial involvement is required, there needs to be corresponding clarity of the direction to department personnel to eliminate the chance for misinterpretation.

In relation to the allegation of interference by the department

5. The lack of clarity and agreement regarding the level of independence of the CME in Alberta was evident in conflicting information provided both internally and publically, and was at the root of the issues subject of this investigation. This should be addressed to avoid similar issues in the future.

In relation to the complaint of reprisal

6. The reasonableness of the human resource management decisions by the department are concerning. Investigation found the complaints against the CME were not substantiated. There was no record of an investigation or impartial review into any of the allegations made against the CME in order to establish their merit, and the CME was not afforded an opportunity to formally respond to the allegations. The department advised this was because the complaints were not formal; however, the department subsequently relied on these unsubstantiated complaints as part of performance management measures for the CME including the letter of expectation, during performance review meetings with the CME, in the briefing to the Premier, and as part of the reason for the decision not to renew their contract of employment. The

[6] **Report of the Commission of the Toronto Computer Leasing Inquiry and the Toronto External Contracts Inquiry** September 12, 2005, by the Honourable Madam Justice Denise E. Bellamy. Volume 2: Good Government. P 892.

management of the complaints against the CME was unfair – the department ought not to rely on unsubstantiated allegations when implementing performance management measures for an employee.

General observations

7. The *Public Interest Disclosure (Whistleblower Protection) Act*, in its current form, does not afford protection to employees who report wrongdoing internally to a manager, or to other external authorities. Protection provisions only apply to employees who seek advice or report wrongdoing to a designated officer or to the Public Interest Commissioner. Investigation of this case found staff within the department were unaware of the Public Interest Commissioner and the *Public Interest Disclosure (Whistleblower Protection) Act*. This highlights the importance for departments to widely communicate to employees the legislation and procedures for making a disclosure.

8. A department solicitor was present during interviews with witnesses and department employees. This is a significant concern and will be addressed under separate cover.

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