



PUBLIC INTEREST COMMISSIONER

Amendments to the *Whistleblower Protection Act*

What Chief Officers and Designated Officers need to know

July 2017

Bill 11: *Public Interest Disclosure (Whistleblower Protection) Amendment Act*, received Royal Assent on June 7, 2017. On proclamation, expected in December 2017, amendments to the Act will impact how **Chief and Designated Officers** manage and investigate disclosures, give advice to employees, and educate staff. Chief Officers need to ensure their internal policies and procedures are current and in line with the amendments when they take effect.

These are the key amendments you need to be aware of:

EXPANDED DEFINITION OF “WRONGDOING”

The Act previously identified “gross-mismanagement of public funds or a public asset” as a wrongdoing. This definition of wrongdoing has been repealed and replaced with:

- 3(1)(c)** *gross mismanagement, including an act or omission that is deliberate and that shows a reckless or wilful disregard for the proper management of*
- (i) public funds or a public asset,*
 - (ii) the delivery of a public service, including the management or performance of*
 - (A) a contract or arrangement identified or described in the regulations, including the duties resulting from the contract or arrangement or any funds administered or provided under the contract or arrangement, and*
 - (B) the duties and powers resulting from an enactment identified or described in the regulations or any funds administered or provided as a result of the enactment,*
 - iii) employees, by a pattern of behaviour or conduct of a systemic nature that indicates a problem in the culture of the organization relating to bullying, harassment or intimidation.*

What does this mean?

In addition to gross mismanagement of public funds or a public asset, the expanded definition of gross-mismanagement includes services provided under certain contracts or enactments which will be identified in the coming regulations.



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The new definition also includes bullying, harassment or intimidation of employees; however this is not intended to address individual complaints which arise in an organization and are appropriately managed through internal mechanisms. This expanded definition is intended to address circumstances of bullying, harassment or intimidation where internal mechanisms have failed, and the conduct has become systemic and cultural in the organization. This is supported through a subsequent provision in the Act stipulating the Commissioner must be satisfied that all applicable mechanisms, including human resource processes or processes under a collective agreement have been used or considered, before investigating a disclosure relating to gross mismanagement of employees. [Sec 19(1.1)]

Moreover, the amendment now provides a specific definition of what actions qualify as “gross mismanagement”. Specifically, gross mismanagement occurs when an act or omission is *deliberate*, and shows a *reckless or wilful disregard* for proper management.

Chief Officers need to ensure their internal policy reflects this expanded definition of “gross mismanagement”.

DIRECT DISCLOSURE TO THE PUBLIC INTEREST COMMISSIONER

Previously, the Act required employees to make their disclosure initially to their designated officer, and permitted a direct disclosure to the Public Interest Commissioner only under certain circumstances. The amendments now permit a disclosure to be made directly to the Public Interest Commissioner in the first instance. [Sec 9]

What does this mean?

Employees now have the option of reporting wrongdoing to their designated officer or to the Public Interest Commissioner. However, the Commissioner continues to have the discretion to refer a disclosure to a designated officer for investigation if the Commissioner considers it appropriate.

Chief Officers need to ensure their internal policy reflects this amendment and that employees now have the option of reporting wrongdoing either to their designated officer or to the Public Interest Commissioner.

INCLUSION OF SUPERVISORS IN PROVIDING ADVICE

Previously, employees considering making a disclosure could request information or advice only from their Designated or Chief Officer. Amendments to the Act now permit employees to also seek advice from their supervisor. [Sec 8(1) and (2)]



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What does this mean?

When an employee seeks advice about making a disclosure, the employee is then protected from reprisal for seeking that advice. This amendment recognizes that many organizations have internal policies that require employees to try and resolve an issue by first reporting a concern (or alleged wrongdoing) to their supervisor; however, if an employee chooses to follow their internal policies and report a matter to a supervisor first, they ought to be afforded the same protections from adverse employment action.

Chief Officers need to ensure their management is aware of the Act and their obligation to provide information and advice about the Act to employees under their supervision. This may include providing detailed information and advice, or simply referring the employee to their Designated Officer or to the Public Interest Commissioner.

The office of the Public Interest Commissioner provides information sessions for employees and/or management to inform them about the Act and their obligations.

FINANCIAL REMEDIES FOR WHISTLEBLOWERS

Amendments to the Act now include the ability for employees to obtain financial remedies in cases where the Commissioner finds a reprisal occurred. If, following an investigation, the Commissioner finds that a reprisal occurred, the Commissioner is obligated to refer the decision to the Labour Relations Board for determination as to the appropriate remedy. [Sec 27.1(1)]

What does this mean?

Organizations and their managers need to be aware that in addition to being subject to prosecution, they may also be required to make financial restitution if they take reprisal action against an employee.

RESTRICTIONS ON PUBLICALLY DISCLOSING INFORMATION

Amendments to the Act specifically restrict Chief Officers from publically identifying, in their annual report, an employee who sought advice, made a disclosure, or made complaint of reprisal, and from disclosing individually identifying health information. [Sec 29(2)]



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PROCEDURES FOR REPORTING IMMINENT RISKS

The amendments now require that Chief and Designated officers report matters of imminent risk to the life, health or safety of individuals or the environment, to:

1. an appropriate law enforcement agency;
2. in the case of a health-related matter, to the Chief Medical Officer of Health;
3. to the department, public entity or office responsible for managing, controlling or containing the risk; and
4. to a person identified in the procedures created by the Chief Officer.

The amendments further require that an investigation into the matter be suspended until it has been finally disposed of by a law enforcement agency or the Minister of Justice and Solicitor General. [Sec 30]

What does this mean?

Chief Officers need to ensure their procedures include a process for reporting matters of imminent risk.

PROCEDURES FOR REPORTING CRIMINAL OFFENCES

In circumstances where the Chief or Designated Officer has reason to believe that an offence has been committed under a statute or regulation, the Act requires the offence be reported to a law enforcement agency and to the Minister of Justice and Solicitor General as soon as reasonably practicable.

The amendments further require that an investigation into the matter be suspended until it has been finally disposed of by a law enforcement agency or the Minister of Justice and Solicitor General.

What does this mean?

Chief Officers need to ensure their procedures include a process for reporting offences to law enforcement agencies and to the Minister of Justice and Solicitor General.

ANNUAL REPORTING REQUIREMENTS

Annual reporting requirements for Chief Officers have been amended. Every Chief Officer must prepare a report annually on all disclosures made or referred to the designated officer. The following information must be included:



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1. the number of disclosures received or referred to the Designated Officer;
2. the number of disclosures acted on;
3. the number of disclosures not acted on;
4. the number of investigations commenced by the Designated Officer;
5. in cases where wrongdoing is found, a description of the wrongdoing and any recommendations or corrective measures taken, or the reasons why no corrective measures were taken.

The Chief Officer's report must be publically available. [Sec 32(1)]

What does this mean?

The reporting requirements are similar to the previous requirements, with the exception that disclosures referred to the Designated Officer by the Public Interest Commissioner are now also to be included in the annual report.

ACCESS TO INFORMATION UNDER THE *FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT*

The *Freedom of Information and Protection of Privacy Act* (FOIPP) is amended now placing restrictions on the right of access to a record that would reveal the identity of a person who has requested advice about making a disclosure, made a disclosure or submitted a complaint of reprisal or whose complaint has been referred to the Labour Relations Board. However, if that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record. [Part 8, Consequential Amendments]

What does this mean?

Applicants under FOIPP do not have the right of access to records that would reveal the identity of a whistleblower, unless the identity of the whistleblower can be severed from the record. Chief Officers need to ensure internal privacy officers are aware of access to information limitations as it applies to the Act.

EXPANDED JURISDICTION OF THE ACT

The amendments have expanded jurisdiction of the Act to include Members of the Legislative Assembly, Ministers and their offices, and the Premier (including his or her office). Jurisdiction has also been expanded to include *prescribed service providers* who will be defined in the succeeding regulation. [Sec 1(h.1) & Sec 4.2]



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REGULATIONS

There are several provisions in the legislation which may be impacted by succeeding regulations. The office of the Public Interest Commissioner will provide information about these regulations when they come into force.

For more information:

Contact the office of the Public Interest Commissioner

780-641-8659 or info@pic.alberta.ca