



Assessing the jurisdiction of disclosures under the *Public Interest Disclosure (Whistleblower Protection) Act*

Information for Designated Officers

Office of the Public Interest Commissioner
March 2022

Introduction

Designated Officers (DOs) are tasked with managing and investigating disclosures of wrongdoing (disclosures) received under the *Public Interest Disclosure (Whistleblower Protection) Act* (the Act). Part of managing a complaint is determining whether a disclosure submitted under the Act is jurisdictional, or whether the disclosure would be better dealt with under alternative complaint mechanisms available within the organization.

The following information will outline key factors for DOs to consider when assessing jurisdiction of disclosures under the Act.

Assessing Disclosures of Wrongdoing

The assessment of a disclosure of wrongdoing must determine:



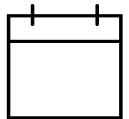
Whether the contents of the disclosure meet the requirements under section 13 of the Act,



Whether the complainant is an Employee as defined by the Act, a non-employee, or anonymous,



Whether the subject matter of the disclosure relates to alleged wrongdoing within your organization,



Whether the alleged wrongdoing occurred post enactment (2013),



On a *prima-facie* basis, whether the allegations meet the definition of a wrongdoing as defined in section 3 of the Act, and



Whether the allegations have a public interest component and are not based solely on perceived wrongs perpetrated against the individual complainant.



Have the requirements of Section 13 – *Contents of a Disclosure* – been met?

A disclosure must be made in writing, and must include the following information **if known**:

- A. A description of the wrongdoing,
- B. The name of the individual, or individuals alleged to have committed (or about to commit) the wrongdoing,
- C. The date of the wrongdoing, and
- D. Any additional information that the DO may reasonably require in order to investigate the matter set out in the disclosure.

*The Act places a requirement on the complainant to inform the designated officer of information **if known**. This allows a designated officer to obtain additional information if needed to help with their assessment, however, shouldn't be interpreted to mean that the absence of any of the information identified in section 13 automatically negates the need for an investigation.*

What is the status of the complainant?

Although a designated officer is not required to accept a disclosure of wrongdoing from a non-employee, they are not restricted from doing so. When receiving a disclosure from a non-employee, designated officers may want to consider whether it is beneficial to investigate the matter under the Act. Things to consider:

- Whether the subject matter is serious in nature, of which the Act was intended to address.
- Whether the investigation may involve employees within the organization who would benefit from the protections of the Act.
- Whether the investigation would benefit from the statutory authority, confidentiality, or investigative procedures unique to the Act.

Note: It is recommended that DOs receiving anonymous complaints from within their organization treat such complaints as a complaint made by an employee.



Does the disclosure meet the definition of *wrongdoing* under the Act?

Section 3 of the Act defines wrongdoing as:

- A contravention of an Act or Regulation
- An act or omission that creates a substantial and specific danger to the life, health or safety of individuals, or to the environment
- Gross mismanagement, including an act or omission that is deliberate and that shows a reckless or wilful disregard for the proper management of:
 - public funds or a public asset,
 - the delivery of a public service, or
 - 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.
- Counselling a wrongdoing

The disclosure must describe a wrongdoing on a *prima facie* basis. Meaning that at face value or based on the first impression, the matter appears to identify a wrongdoing as defined above.

When did the alleged wrongdoing occur?



The alleged wrongdoing must have occurred post enactment (June 1, 2013)



The Transitional Regulation sets out the circumstances under which the Act applies as it existed before March 1, 2018



On matters where the alleged wrongdoing occurred completely prior to March 1, 2018, the disclosure must be investigated in accordance with the original statute (2013)



Matters that occurred before enactment (June 1, 2013) are non jurisdictional

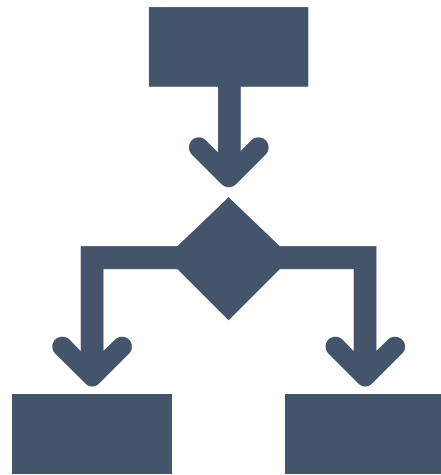
Does the disclosure of wrongdoing relate to a *public interest* matter or a *personal matter*?

For a matter to be considered a *public interest* disclosure the allegations should have a public interest component and should not be based on perceived wrongs perpetrated solely against the individual complainant.

The purpose of the Act is to facilitate the disclosure and investigation of significant and serious matters, that an employee believes may be unlawful, dangerous to the public or injurious to the *public interest*.

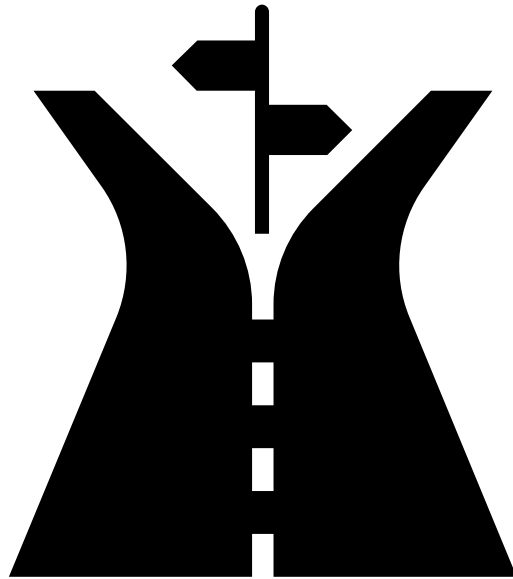
A personal grievance or individual dispute between management and employee is not a public interest matter.

Decisions by Designated Officers



- It is important that the DO documents the outcome of their jurisdictional assessment and communicates the decision and rationale to the complainant.
- The extent of the DO's assessment should be whether the complaint is jurisdictional or not.
- The complainant has the option of appealing a DO's decision to the Commissioner's office.
- If a DO decides the complaint is not jurisdictional to the Act, they need to inform the complainant and allow them to decide whether to use another mechanism to address their concern.
- The DO should not automatically investigate the matter under another process.

Pursuing other mechanisms following a complaint under the Act



When a decision is made not to investigate a disclosure under the Act, the employee must be able to decide for themselves whether they want the matter pursued under another mechanism.

This is important as employees need to know that the protection provisions only apply to investigations conducted under the Act.

Regardless of the employee's decision, they remain protected for their initial act of making a disclosure under the Act.

Reprisals under the Act

Any measure that adversely affects the employment or working conditions of an employee who has:

- Sought advice about making a disclosure,
- Made a disclosure,
- Cooperated with an investigation under the Act,
- Declined to participate in a wrongdoing, or
- Done anything in accordance with the Act.

The Commissioner has exclusive jurisdiction over investigations of reprisal. If a DO suspects a reprisal has occurred, they are advised to seek advice from the Commissioner's office. If an employee reports a reprisal to them, the DO must refer the complainant to the Commissioner.

Consultation

Designated Officers are encouraged to request advice or assistance from the Commissioner's office on all matters relating to the Act. This may include:

- General assistance in assessing the jurisdiction of disclosures,
- Advice on conducting investigations under the Act,
- Advice on managing complainants,
- Advice on whistleblower policies and procedures, and
- Any other matter related to managing and investigating public interest disclosures.

Referrals

The Designated Officer may also refer a disclosure to the Commissioner's office if they believe assistance from the Commissioner's office is needed. This may include circumstances where:

- The organization may not have the required expertise or resources available to investigate a particular disclosure,
- There may be an actual or perceived conflict of interest,
- The alleged wrongdoer is a senior executive or member of the Board of Directors, and
- Situations where the severity and seriousness of the alleged wrongdoing may require the involvement of the Commissioner's office.



**PUBLIC INTEREST
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Need some assistance?

Contact the office of the Public Interest Commissioner for advice or assistance on any matter relating to the *Public Interest Disclosure (Whistleblower Protection) Act*.

By Phone

Edmonton 780.641.8659

Toll Free 1.855.641.8659

By Email

info@pic.alberta.ca

Visit the Commissioner's website for more information and resources at www.yourvoiceprotected.ca.