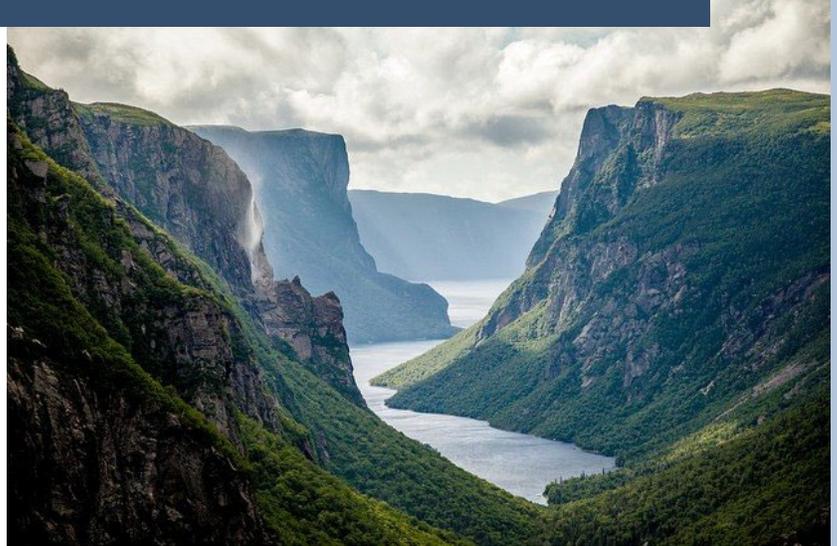




Office of the Citizens'  
Representative

**ANNUAL  
REPORT  
2021 - 2022**

**Public Interest Disclosure and  
Whistleblower Protection Act**



**Province of  
Newfoundland and  
Labrador**



Office of the Citizens' Representative  
Province of Newfoundland and Labrador

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July, 2022

The Honourable Derek Bennett, MHA  
Speaker of the House of Assembly  
Confederation Building  
St. John's, NL

Dear Mr. Speaker:

It is my duty and privilege to submit to the House of Assembly my Report on the activities of the Office of the Citizens' Representative under the **Public Interest Disclosure and Whistleblower Protection Act** ("the Act").

This Report is submitted under Section 20(1) of the Act, and covers the 2021-2022 Fiscal Year.

Yours truly,

**Bradley J. Moss**  
Citizens' Representative

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## Citizens' Representative Message



Whistleblowing is one of the most conflict-ridden and intricate areas of public policy and investigative practice. For a discloser, it requires astute observational skills, the courage to come forward, a willingness to work with an investigator to relay painful aspects of their professional and personal life, and a willingness to risk reprisals in the workplace. They are sometimes incorrectly and unfairly categorized as spies, snitches and other despised names for informers.

For a person impugned by allegations of wrongdoing (typically someone in higher authority) there is uncertainty, a risk of reputational harm or job loss, and a massive investment of time and energy that inevitably takes them away from their core mandate duties.

For the witnesses, there is also uncertainty and apprehension. Sometimes there is a distinct feeling of not wanting to be involved even though they may have witnessed problems in the workplace.

For the investigator, there is the expected stress of wading into the more unattractive aspects of workplace conflict, an obligation to be flexible (including working nights and weekends), balancing the investigative workload against other demands, and ensuring the enshrined procedural rights of all participants are respected. All of this is in concert with doing the investigation properly.

Nevertheless, this complex investigative system and witness dynamic results in what citizens expect: deterrence, detection and correction of wrongdoing in the name of transparency and, moreover, accountability by those holding public office.

Informal inquiries anticipated in the **Public Interest Disclosure and Whistleblower Protection Act** are often powerful enough for a public body to correct lower level misconduct and mismanagement. Formal investigations, based in concrete evidence and credible disclosures can be powerful tools to root out corruption and gross mismanagement.

This Office remains well-equipped and determined to act on public interest disclosures across both the legislature-specific and executive programs. Our 2021-22 activities under the **Public Interest Disclosure and Whistleblower Protection Act** (covering line departments and agencies) are contained in this document.

I wish to thank my dedicated and professional staff for their assistance over the last year in this business line, and the preparation of this annual report.



**Bradley J. Moss**  
Citizens' Representative

## The Public Interest Disclosure and Whistleblower Protection Act

Public service employees generally ensure the responsible and fair provision of services to citizens of the province. By extension, public service employees may acquire intimate knowledge of internal problems within government and its various agencies, boards and commissions. They have a crucial role to play in keeping their workplaces safe and respectful for themselves; keeping all aspects of government operations free from gross mismanagement; reporting suspected statutory offences; and protecting our environment. It is important to provide employees with a confidential, impartial and supportive avenue to disclose, discuss and work towards mitigation of the identified problem.

- ❖ The **Public Interest Disclosure and Whistleblower Protection Act (PIDA)** provides the right to current employees to disclose concerns about suspected wrongdoings within their organization and the right to be protected from reprisal for doing so. These rights reinforce the key values of integrity and accountability in the public sector.
- ❖ The PIDA protects the identity of an employee making a disclosure, maintaining confidentiality to the extent permitted by law and consistent with the need to conduct a proper investigation.
- ❖ The PIDA provides an avenue for employees of the public service to come forward in a confidential manner with allegations of specific wrongdoing they believe should be investigated in a fair and effective manner and rectified in the public interest. The Citizens' Representative, as an Officer of the House of Assembly, is independent of the provincial government, inclusive of all public bodies subject to the PIDA. They are free to reach their own conclusions of matters raised under the PIDA.
- ❖ The PIDA contains penalties, including job loss, against wrongdoers or any person who commits a reprisal against an employee suspected of disclosing in the public interest. Misleading the Citizens' Representative or his investigators, or falsifying or destroying evidence is punishable under the PIDA, and can result in personal fines of up to \$10,000.

## Departments and Public Bodies Covered by the PIDA

“Departments” are defined at Section 2(e) of the PIDA as:

- A department created under the **Executive Council Act** and includes a branch of the executive government of the province.

“Public Bodies” are defined at section 2(h) as:

- a corporation, the ownership of which or a majority of shares of which is vested in the Crown,
- a corporation, commission or body, the majority of the members of which, or a majority of the members of the board of directors of which are appointed by an Act, the Lieutenant Governor in Council or a minister;
- a school board or school district constituted or established under the **Schools Act (1997)**, including the Conseil Scolaire Francophone, and
- a corporation, commission or other body designated by regulation as a public body.

Memorial University has its own internal disclosure process and is exempt from investigation under the PIDA.

Employees and Members of the House of Assembly also have access to a process comparable to that under the PIDA. Any such disclosures or inquiries are referred for possible investigation under the **House of Assembly Accountability, Integrity and Administration Act**.

## What is a “Wrongdoing”?

Wrongdoing is defined in Section 4(1) of the PIDA:

4. (1) This Act applies to the following wrongdoings in or relating to the public service:

- an act or omission constituting an offence under an Act of the Legislature or the Parliament of Canada, or a regulation made under an Act;
- an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment, other than a danger that is inherent in the performance of the duties or functions of an employee;
- gross mismanagement, including of public funds or a public asset; and
- knowingly directing or counselling a person to commit a wrongdoing described in paragraph (a), (b) or (c).

## What is “Gross Mismanagement”?

The PIDA does not specifically define gross mismanagement. This permits a flexible approach when assessing potential disclosures. Generally, the Citizens’ Representative will ask if the allegations, as stated, are proven, would they engage any of the following:

- matters of significant importance;
- serious errors that are not debatable among reasonable people;
- something more than a *de minimus*, or "one-off" wrongdoing or negligence;
- management action or inaction that creates a substantial risk of significant adverse impact upon the ability of an organization, office, or unit to carry out its mandate in the public interest;
- the deliberate nature of the wrongdoing; and
- the systemic nature of the wrongdoing.

Post-investigation, consideration of gross mismanagement would also be present in cases with credible evidence showing the application of management responsibilities in a manner grossly deviating from the standard of care or competence that a reasonable person would follow in the same situation.

Not all of these factors have to be present before a disclosure is accepted for investigation, and the existence of one of the factors alone may not constitute wrongdoing for the purposes of the PIDA.

In cases that don't meet these threshold tests, the Citizens' Representative will consider, in his discretion, investigating the matter via Section 15 of the **Citizens' Representative Act**, without a named individual. The resulting "Ombudsman own motion" investigation may go on to identify breach of duty or misconduct on behalf of a government employee.

## Public Interest Disclosures

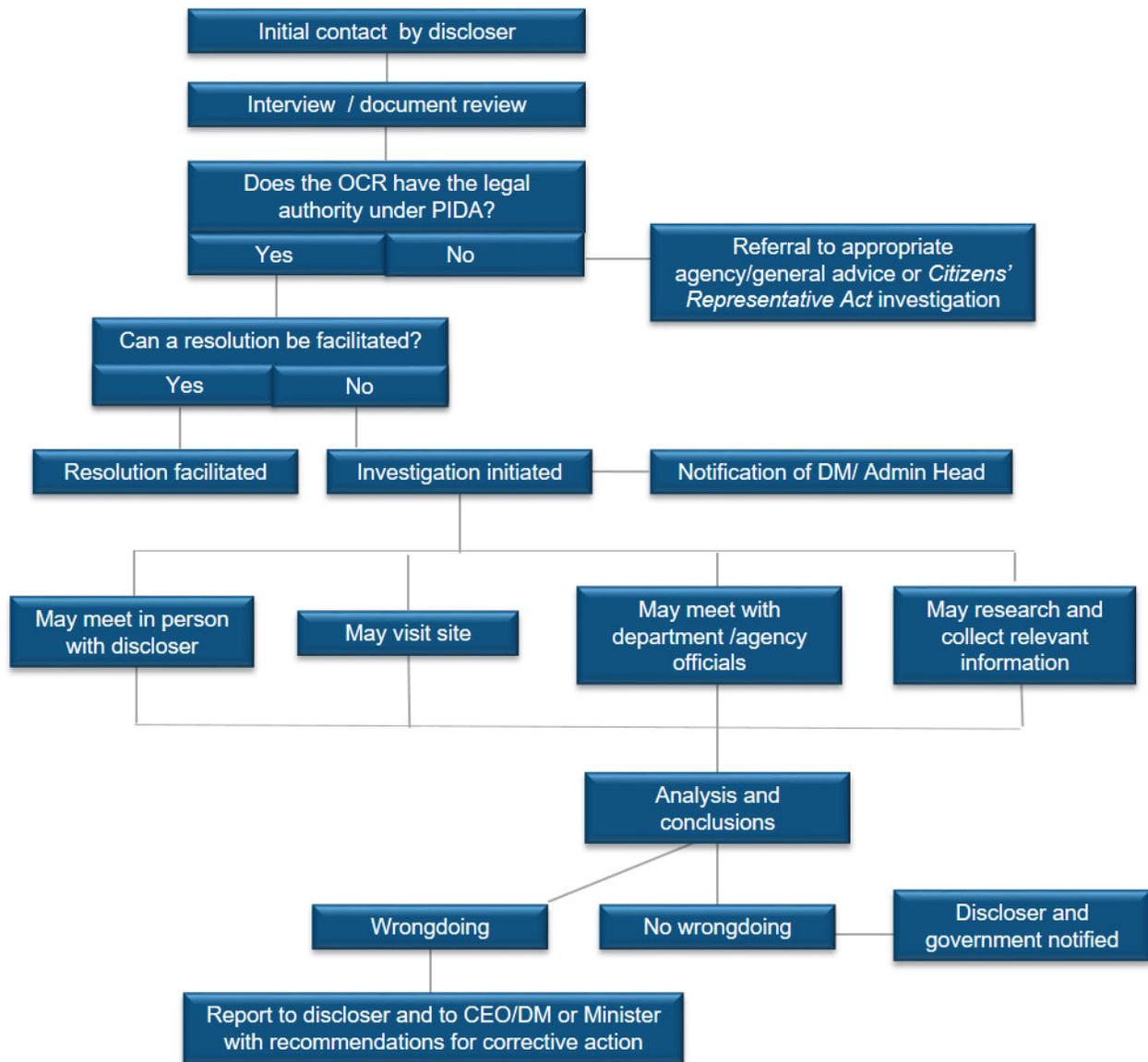
Public interest disclosures are required to be in writing pursuant to Section 8 of the PIDA. It will include a description of the wrongdoing, the name of the person(s) alleged to have committed the wrongdoing, the date of the wrongdoing, and whether the wrongdoing has already been disclosed. A written disclosure usually follows a period of inquiry, as previously described. In some cases, the completed forms and evidence arrives in a package, or via a solicitor.

OCR invests the time necessary to thoroughly analyze the evidence, clarify key allegations, or probe other areas that may not be covered in the written disclosure. It is beneficial to provide as much descriptive information as available when making a disclosure.

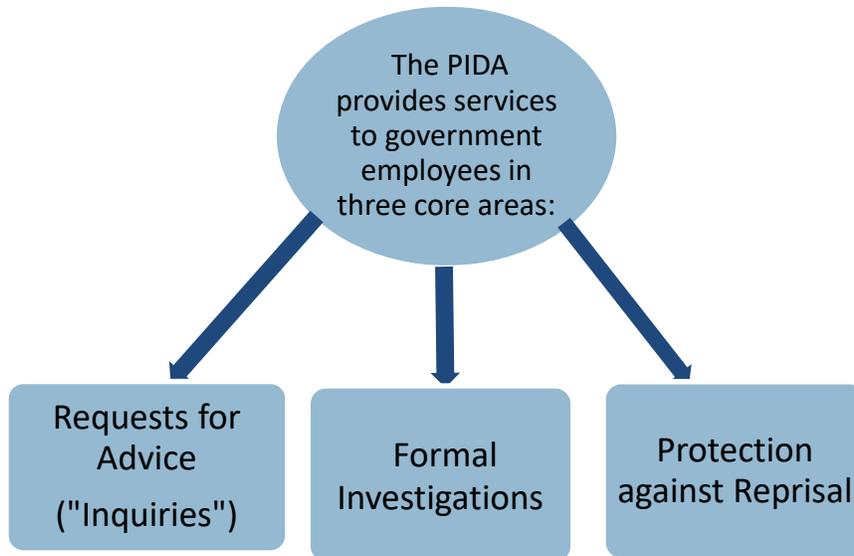


A written disclosure of wrongdoing that has *prima facie* merit, and is made by a government employee about a jurisdictional public body, is formally investigated under the PIDA. The investigation process is set out in the following chart.

## The Disclosure Process



## Services Provided Under PIDA



## Requests for Advice ("Inquiries")

Section 6 of the PIDA states "an employee who is considering making a disclosure may request advice from the Citizens' Representative."

We consider the provision of advice and any communications prior to the registration of a formal written disclosure an "inquiry" as anticipated in Section 20. In some cases, prospective disclosers are seeking information on:

- the blanket legal protections afforded by the PIDA;
- protections against the disclosure of their identity;
- how the investigative process works; or
- the best way to remedy their issue and discuss their dilemma.

In some cases, there are already collective bargaining, court, HR or quasi-judicial processes that are underway, that may be stalled, or recently concluded.

The PIDA cases differ from our normal Ombudsman work with the general public who are experiencing difficulties with the public service. Employees may be hesitant to formally engage the process, and desire anonymity in the initial stages until some measure of comfort is found with formally disclosing in writing.

The inquiry process may also require the employee to provide more concrete evidence of wrongdoing over and above simple allegations in order to provide a more solid basis for investigation. In some cases, the employee is in a state of crisis, depression, financial hardship, or feels victimized. Sometimes, periods of personal reflection exist between the initial provision of advice and a formal disclosure.



## Formal Investigations

Disclosures received are investigated as informally and expeditiously as possible, as required by section 14 of the PIDA. This section also ensures the right to procedural fairness and natural justice to all persons involved in an investigation, including persons making disclosures, witnesses and persons alleged to be responsible for wrongdoings.

In situations wherein a disclosure may not meet the threshold for a wrongdoing under the PIDA, further assessment of the allegations may result in an investigation in a confidential manner under the Ombudsman legislation and process.

Section 13 of the PIDA provides the purpose of an investigation into a disclosure of wrongdoing as bringing the wrongdoing to the attention of the public body and recommending corrective measures that should be taken.

There may be occasions whereby a formal disclosure has not been submitted, yet the allegations informally brought forward remain of concern. In the situation where an informal disclosure gives the appearance of the allegations, if accurate, meeting the threshold of a wrongdoing, these allegations can be brought forward to the head of the public body for internal assessment to facilitate resolution within the public service. Any such action would be carried out in the public interest while maintaining protection for the identity of the whistleblower(s).

## Protection Against Reprisal

A reprisal is specific action taken against an employee who either comes forward with allegations, seeks advice, or is a witness who participates in an investigation. Reprisals are prohibited under the PIDA.

Reprisals are defined in Section 2(j) as:

- discipline;
- a demotion;
- termination of employment;
- a measure that adversely affects his or her employment or working conditions; or
- a threat to take any of the above measures.

Reprisals fall within the jurisdiction of the Newfoundland and Labrador Labour Relations Board. Under the PIDA, upon receipt of a reprisal allegation, the Board must consider whether one or more of the Section 2(j) measures has been taken against an employee because he or she has, in good faith, sought advice about making a disclosure; made a disclosure; or cooperated in an investigation.

Upon finding convincing evidence of a reprisal the Board may order that a person:

- be permitted to return to his or her duties;
- be reinstated or have damages paid where the Board considers that the trust relationship between the parties cannot be restored;
- receive compensation for lost wages that would have been paid but for the reprisal;
- receive compensation for expenses or other financial losses incurred as a direct result of the reprisal.

In addition, the Board may:

- order that the activity that constitutes the reprisal cease;
- order that the situation resulting from the reprisal be rectified; and,
- order that a person “do or refrain from doing anything in order to remedy a consequence of the reprisal.

## Statistics

Section 20(1) of the PIDA requires specific reporting by the Citizens' Representative in six areas of activity.

### Allegations of Wrongdoing

#### Allegations of Wrongdoing 2021-2022

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6

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#### Formal Investigations under PIDA

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We considered allegations from six (6) individuals under the PIDA during 2021-2022. In situations where formal disclosures are not received, the allegations are considered as inquiries for reporting purposes.

Of interest, the OCR is also responsible for public interest disclosures under Part VI of the **House of Assembly Accountability, Integrity and Administration Act** (HOAAIAA). While there is no obligation to report these statistics under the PIDA, it is worthy to note that we considered two (2) allegations under the HOAAIAA, separate and apart from those received under the PIDA.

Results for April 1, 2021 through March 31, 2022, are addressed in the following tables as they appear in Section 20.

**Table 1 – The PIDA Section 20 Compliance Results**

The PIDA Subsection	Results
20(1)(a): Number of inquiries relating to the PIDA.	6
20(1)(b): Number of disclosures received and number acted on and not acted on.	<p>Of the 6 inquiries:</p> <ul style="list-style-type: none"> <li>▪ 0 formal written disclosures received;</li> <li>▪ 6 potential disclosers were provided advice;</li> <li>▪ 3 potential disclosures did not meet the definition of wrongdoing;</li> <li>▪ 1 potential discloser migrated to the <b>Citizens’ Representative Act</b> where resolution was facilitated;</li> <li>▪ 1 potential discloser was not a public employee, therefore, not entitled to disclose;</li> <li>▪ 1 potential disclosure was referred to Protected Disclosure Policy, Memorial University;</li> <li>▪ 0 migrated to formal investigation under the PIDA;</li> </ul>
20(1)(c): Number of investigations commenced under the PIDA.	0 investigations commenced under the PIDA.
20(1)(d): Number of recommendations the Citizens’ Representative has made and whether the department or public body has complied with the recommendation.	0 during FY 2021-2022
20(1)(e): Whether, in the opinion of the Citizens’ Representative, there are any systemic problems that give rise to wrongdoings.	N/A
20(1)(f): The recommendations for improvement that the Citizens’ Representative considers appropriate.	N/A

**Table 2 – Inquiries and Disclosures Received  
April 1, 2021 – March 31, 2022**

The PIDA Subsection	Inquiry / Disclosure	Status / Disposition
4(1)(a) an act or omission constituting an offence under an Act of the Legislature or the Parliament of Canada, or a regulation made under an Act.	N/A	N/A
4(1)(b) an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment, other than a danger that is inherent in the performance of the duties or functions of an employee.	1) Inquiry re: an act or omission that creates a substantial and specific danger to the life, health or safety of persons.	Provision of advice. This matter disclosed to the responsible department where redress should occur.
4(1)(c) gross mismanagement, including of public funds or a public asset.	2) Inquiry re: gross mismanagement.  3) Inquiry re: gross mismanagement.  4) Inquiry re: gross mismanagement.  5) Inquiry re: gross mismanagement.  6) Inquiry re: gross mismanagement.	Provision of advice. Potential discloser did not meet definition of wrongdoing.  Inquiry migrated to <b>Citizens' Representative Act</b> .  Provision of advice. Did not meet the definition of wrongdoing. Potential discloser was not a public employee, therefore, not entitled to disclose.  Provision of advice. Potential discloser did not meet the definition of wrongdoing.  Referred to Protected Disclosure Policy, Memorial University.
4(1)(d) knowingly directing or counselling a person to commit a wrongdoing described in paragraph (a), (b) or (c).	N/A	N/A

There were no investigations commenced under the PIDA during the fiscal year 2021-22.

In each of these situations, disclosers were provided with advice in relation to the managing and appropriate outlet for their allegations.





## Contact Information:

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