

Public Interest Disclosure Commissioner Annual Report 2015



**Public Interest
Disclosure
Commissioner**

Speak out. Safely.

Table of Contents

1	COMMISSIONER'S MESSAGE
3	ABOUT PUBLIC INTEREST DISCLOSURE
8	CASE WORK
17	STATISTICS
18	BUDGET AND STAFF

How to Reach Us

REGINA OFFICE

**#150 – 2401 Saskatchewan Drive
Regina, Saskatchewan S4P 4H8**

**Phone: 306-787-6211
Toll Free: 1-800-667-7180
Fax: 306-787-9090
info@saskpidc.ca**

SASKATOON OFFICE

**500 – 350 3rd Avenue North
Saskatoon, Saskatchewan S7K 6G7**

**Phone: 306-933-5500
Toll Free: 1-800-667-7180
Fax 306-933-8406
info@saskpidc.ca**

Website: www.saskpidc.ca



**Public Interest
Disclosure
Commissioner**

Speak out. Safely.

April 2016

Speaker of the Legislative Assembly
Province of Saskatchewan
Room 129 Legislative Building
2405 Legislative Drive
Regina, Saskatchewan S4S 0B3

Dear Mr. Speaker:

In accordance with subsection 23(1) of *The Public Interest Disclosure Act*, it is my duty and privilege to submit to you the fourth annual report of the Public Interest Disclosure Commissioner for 2015.

Respectfully submitted,

Mary McFadyen
COMMISSIONER

Vision, Mission, Values and Goals

Ombudsman Saskatchewan also serves as the Office of the Public Interest Disclosure Commissioner. Our vision, mission, values and goals reflect our dual role:

Vision

Our vision is that government is always accountable, acts with integrity, and treats people fairly.

Mission

Our mission is to promote and protect fairness and integrity in the design and delivery of government services.

Values

We will demonstrate in our work and workplace:

- fairness, integrity and accountability
- independence and impartiality
- confidentiality
- respect
- competence and consistency

Goals

Our goals are to:

- Provide effective, timely and appropriate service.
- Assess and respond to issues from a system-wide perspective.
- Undertake work that is important to the people of Saskatchewan.
- Demonstrate value to the people of Saskatchewan by making recommendations that are evidence-based, relevant and achievable.
- Be experts on fairness and integrity.
- Educate the public and public servants about fairness and integrity.
- Have a safe, healthy, respectful and supportive work environment.

Commissioner's Message

This is the fourth annual report of the Commissioner under *The Public Interest Disclosure Act* – a role in which the Ombudsman has served since 2012.

The Commissioner's role is to provide advice to and receive disclosures of wrongdoings directly from public servants. The Commissioner also investigates complaints of reprisal from public servants who believe they have been retaliated against because they sought advice, disclosed a wrongdoing, refused to participate in a wrongdoing, or co-operated with an investigation under *The Public Interest Disclosure Act*.

We completed two investigations in 2015. One involved five disclosures of wrongdoing made against the Saskatchewan Research Council. Another involved a complaint of reprisal brought by a former public servant. The results of these investigations are summarized in this annual report.

The Commissioner's mandate is still quite new and not well known or understood by public servants. This is borne out, in part, by the fact that the number of public servants contacting our Office each year is still relatively low. However, we have made some interesting observations in 2015. This past year, we received three anonymous disclosures of wrongdoing. As a result, we could not confirm whether the disclosers were public servants. Strictly speaking, *The Public Interest Disclosure Act* only gives public servants the right to make disclosures and receive the protections of the Act. However, we feel we have an obligation to ensure that any allegations of wrongdoing that are brought to our attention are properly reviewed, investigated and, if founded, addressed. In these cases, we referred these allegations of wrongdoing to the government institution in which they were alleged to have occurred, to investigate. We requested that they provide us with the results of their investigations. In each case, the government institution was cooperative.



Mary McFadyen,
Commissioner

The Public Interest Disclosure Act requires the Minister responsible for the Public Service Commission to report annually on all disclosures made to designated officers within all government institutions. While the three anonymous allegations of wrongdoing that we referred to government institutions did not technically fall within the Act, because we could not confirm whether the disclosers were public servants, we would suggest that these activities be reported as disclosures in the spirit of the Act. It is in the public interest that all allegations of wrongdoing in government institutions, whether anonymous or not, are taken seriously and properly addressed.

In 2015, we continued to take steps to increase awareness of *The Public Interest Disclosure Act*, and to make sure that public officials and public servants understand the Act. In the year ahead, we will continue our public awareness role. It is aimed at ensuring that public servants and government institutions understand the reasons for the legislation and the protections and responsibilities it establishes. Given that we are approaching the fifth anniversary since the passing of the legislation, we will be looking at possible ways the legislation could be improved to ensure that it is meeting its purpose. It is in the public interest that public servants are confident that they have an impartial and independent organization they can contact to raise allegations of wrongdoing without fear of reprisal, and that their concerns will be addressed appropriately.



About Public Interest Disclosure

The purpose of *The Public Interest Disclosure Act* is to promote accountability and integrity within Saskatchewan's public sector. It does so by:

- Establishing a system for public servants to disclose concerns about suspected wrongdoings.
- Protecting public servants who make a disclosure or seek advice under the Act from reprisals.
- Ensuring that disclosures of wrongdoing are investigated in a fair and effective manner.

The Act provides two avenues for public servants who want to seek advice or make a disclosure: either the Public Interest Disclosure Commissioner or a designated officer within their organization.

It is up to the individual public servant to decide whether to seek out the Commissioner or the designated officer. No matter which option the public servant chooses, he or she is equally protected from reprisals.

THE ROLE OF THE PUBLIC INTEREST DISCLOSURE COMMISSIONER

The Office of the Public Interest Disclosure Commissioner is established under *The Public Interest Disclosure Act*. The Act allows the provincial Ombudsman to be appointed as the Commissioner.

The Commissioner is an Officer of the Legislative Assembly and as such is independent from the provincial government and the government institutions subject to the Act. She is free to reach her own conclusions about concerns that come to her Office.

Under the Act, the Commissioner has jurisdiction to investigate and take appropriate steps to help resolve matters raised by public servants related to alleged wrongdoings in government institutions.

The Commissioner has sole jurisdiction to investigate complaints of reprisal taken against public servants for actions they took under the Act.

Who is Considered a Public Servant?

Under the Act, public servants include employees of provincial government institutions that fall under the Act. The Act does not apply to members of the public.

Which Government Institutions Does *The Public Interest Disclosure Act* Apply to?

Government institutions include the office of Executive Council, any department, ministry, secretariat or other similar agency of the executive government of Saskatchewan or any body listed in Part 1 of the Appendix to *The Freedom of Information and Protection of Privacy Regulations*. Most provincial government ministries, agencies, boards, commissions, and Crown corporations are covered by *The Public Interest Disclosure Act*.

The Act does not apply to private businesses, other officers of the Legislative Assembly, members of the Legislative Assembly, the federal government, other provincial governments, the courts, regional health authorities, publicly-funded health agencies, school divisions, universities, colleges, cities or municipalities.

WHAT IS A WRONGDOING?

A wrongdoing is any of the following:

- a contravention of a provincial or federal act or regulation
- an act or omission that creates a substantial and specific danger to the life, health or safety of persons* or the environment
- gross mismanagement of public funds or assets
- counseling to commit a wrongdoing

** Other than a danger that is inherent in the performance of a public servant's job.*

Generally, wrongdoings under the Act do not include issues related to personal or private interests such as individual grievances and workplace conflicts. These issues are more appropriately dealt with by existing workplace or public sector policies, codes of conduct and grievance procedures.

WHAT IS A REPRISAL?

Public servants may make a complaint to our Office if they believe they have suffered reprisals for having sought advice about, disclosed or refused to participate in a suspected wrongdoing, or co-operated in an investigation under the Act.

Reprisals include but are not limited to:

- dismissal
- layoff
- suspension
- demotion or transfer
- discontinuation or elimination of a job
- change of a job location
- reduction in wages
- change in hours of work or reprimand
- any other measure that adversely affects the public servant's employment or working conditions
- threats to take any of these measures

THE ROLE OF THE PERMANENT HEAD

Permanent heads include:

- deputy ministers
- the president or other official in charge of a government institution, who is directly responsible to a minister or the Premier
- chief executive officers of Crown corporations
- the chair, or the chair of the board of prescribed institutions other than Crown corporations

Sections 5, 6 and 8 of the Act assign specific responsibilities to permanent heads.

Section 5: Appoint a Designated Officer

Section 5 requires permanent heads to appoint a senior official to be the designated officer for the purposes of the Act. If the permanent head does not designate a senior official then the permanent head is the designated officer.

Section 6: Establish Procedures to Manage Disclosures

Section 6 requires every permanent head to establish procedures to manage disclosures by public servants of the government institution, and specifies the features the procedures must include.

Section 8: Communicate Widely with Public Servants

Section 8 requires permanent heads to ensure that information about the Act and the disclosure procedures of the government institution are widely communicated to the public servants of the government institution.

THE ROLE OF THE DESIGNATED OFFICER

Designated officers are often the first point of contact for public servants who want to disclose their concerns or to seek advice within the workplace.

Designated officers receive and deal with disclosures according to the requirements of the Act (e.g. confidentiality, procedural fairness).

EXCEPTION CONSULTATIONS

Section 7 of the Act allows the permanent head of a government institution to not appoint a designated officer and not establish procedures to manage disclosures, if the permanent head believes that it is not practical to apply those sections of the Act to the government institution, because of its size.

Section 7 requires government institutions to consult with the Commissioner before making this decision.

All disclosures and inquiries from public servants at these institutions must be directed to the Commissioner. These government institutions are still required to comply with the rest of the Act, including section 8, by widely communicating to employees information about the Act.

Government institutions whose permanent heads have decided not to have a designated officer or procedures to manage disclosures are listed on our website under **www.saskpidc.ca**.



Case Work

INQUIRIES

There are times when public servants wonder whether something going on in their workplace would qualify as a wrongdoing under *The Public Interest Disclosure Act*. Sometimes they have questions about what they can do about it. We welcome these inquiries and encourage public servants to contact us. Even if we think they should not make a disclosure of wrongdoing or a complaint of reprisal, we can provide information about the Act and discuss their options.

In 2015, we received inquiries about various topics, including potential harassment, mismanagement of funds, counselling to commit a wrongdoing and contravention of an Act. We provided information to those who inquired and discussed their options with them. In some cases, they decided to see if the situation would be corrected, or to make a complaint internally first. In other cases, the matter or the institution fell outside our jurisdiction and we referred the person elsewhere. For example, one of the inquiries was from a municipal employee. Since *The Public Interest Disclosure Act* does not apply to municipalities, we referred the person back to the municipality.

CASE FILES

We continued to provide advice to public servants and to receive disclosures of alleged wrongdoing and complaints of reprisal. Following are two summaries of investigations we completed in 2015.

Summary of an Investigation of a Complaint of Reprisal

This summary has been written in a manner to help protect the identity of the complainant.

In 2015, we investigated a complaint of reprisal from a former public servant. The complainant alleged that he was treated improperly in the workplace after being on extended leave and then his employment was terminated because he had made a disclosure of a wrongdoing in the workplace.

We found that the complainant had reported an allegation of wrongdoing in the workplace before *The Public Interest Disclosure Act* came into force. The employer documented the allegation, investigated, determined that the allegation was founded, and took steps to address the wrongdoing. The complainant was then absent from the workplace for an extended period. The complainant alleged that when he returned to work, the employer treated him unfairly and eventually terminated his employment, both of which, he said, were a direct result of him reporting the wrongdoing in the workplace.

We determined that the employer had taken reasonable steps to reintegrate the complainant back into the workplace after his extended leave. We found no evidence that any of the employer's actions when the complainant returned to work were taken in reprisal against the complainant because he had reported a wrongdoing. There was evidence, which we accepted, to support the employer's reasons for terminating the complainant. There was no evidence that the complainant was terminated because he had reported a wrongdoing. Therefore, the complaint of reprisal was unfounded.

Summary of an Investigation into a Disclosure of Wrongdoings

Saskatchewan Research Council

A former employee of the Saskatchewan Research Council (SRC) provided information to the Commissioner's Office that he believed showed that the following wrongdoings had occurred while he was employed at SRC:

1. In order to use up a budgetary surplus in the fiscal year 2011-12, SRC spent public funds for the sake of spending without regard to the merits of the purchases. Specifically, the SRC bought Apple iPads for all of its employees.
2. The SRC spent over \$500,000 to purchase software for a division that was not profitable and which it knew was very likely to be closed, thus allowing no opportunity to use or recover the cost of the software.
3. The SRC spent \$230,000 for extended support services, which would not be available for two years – so the expenditure was at risk of being wasted if the service provider went bankrupt.
4. The SRC asked (or directed) the discloser to participate in a project that involved potential illegalities and/or unethical conduct.
5. The SRC attempted to conduct business in Argentina in violation of *The Research Council Act*.

We conducted an investigation. Below is a summary of our findings and conclusions.

Disclosure 1 – iPad Purchase: No Finding of Wrongdoing

- The SRC purchased iPads for its entire staff in the last month of its 2011–12 fiscal year without a documented business rationale for doing so.
- We found that SRC did not comply with the intent of its purchasing policy: it purchased the iPads at full retail price without engaging in a competitive procurement process in which other tablet suppliers could bid for its business.
- It documented its business rationale after it had made the purchase: that some of its employees did not have access to computers so iPads would be a cheaper alternative to purchasing computers. However, this only applied to one third of its workforce, as the other two thirds had access to computers.

- Gross mismanagement is characterized by a significant departure from established standards for managing public funds or assets that would shock or seriously concern an informed, reasonable member of the public. *(For more information about gross mismanagement, see “What is Gross Mismanagement?” at the end of this section.)*
- SRC mismanaged the procurement process and provided only a partial business rationale for buying iPads for all its employees. This would concern a reasonable member of the Saskatchewan public. However, it was not motivated by bad faith. In our view, it was not such an extreme departure from established standards that it would shock a reasonably informed person – it did not affect SRC’s viability, the up-front cost was a small fraction of SRC’s total budget, and its employees are in fact using the iPads for business. Therefore, we concluded that it was not gross mismanagement under clause 3(c) of the Act.

Disclosure 2 – Purchasing Software for a Division that was Likely to be Closed: No Finding of Wrongdoing

- The discloser reported that SRC spent approximately \$500,000 for software and related hardware known as a laboratory inventory management system (LIMS) for its AG-BIO division, which had been losing money for years and SRC knew was very likely to be shut down. The discloser also reported that SRC continued to wrongly use the name “GenServe” on its website after selling the name and related AG-BIO business with the intent of misleading us.
- SRC invested in the LIMS after considering the likelihood of AG-BIO’s livestock business winding down and being sold. It made the purchase based on an appropriate analysis within the context of an approval process that reasonably accounted for the risk of the livestock business failing and considered what other areas of SRC’s business could use the system.

- The LIMS may not have resulted in the profits SRC hoped to realize from its livestock business (which it has now sold), but the purchase did not constitute gross mismanagement under clause 3(c) of the Act. It was neither motivated by bad faith nor such an extreme departure from established standards that it would shock a reasonably informed person – it did not affect SRC’s viability, and it is using (or intends to use) the LIMS in other areas of its business.
- SRC’s use of the term “GenServe” on its website after it sold this part of its business was not intended to mislead us and was not a wrongdoing. If the new owner of the name “GenServe” was aggrieved by SRC’s use of it, the new owner could have pursued what civil remedies it may have had.

**Disclosure 3 – Scanner Extended Service Purchase:
No Finding of Wrongdoing**

- The discloser submitted that SRC paid in advance for a five-year service contract for a scanner, the term of which was to begin after an initial two-year warranty period, so the contract would not end until seven years after the scanner was purchased. The discloser believes that this payment was gross mismanagement, because, if the vendor went bankrupt during this period, SRC could lose the money it spent on the service contract.
- Though SRC could not adequately explain whether or not it saved any money by purchasing the five-year extended service plan up front and it provided us with inconsistent information about how the purchase was approved and procured, the purchase was made for a legitimate purpose and was made with an understanding of the risks associated with paying up front for the service plan. It is currently receiving value from the plan.
- We found no evidence that the vendor was at any particular risk of going out of business during the period. We noted that the vendor was still in business at the time our report to the SRC was finalized.
- This purchase did not constitute gross mismanagement under clause 3(c) of the Act. It was made for a legitimate business purpose.

Disclosure 4 – Lien Holdback and Lobbying Activities

1. Lien Holdback – Gunnar Mine Site Remediation Project: Finding of Wrongdoing (No Recommendations)

- The discloser submitted that SRC ordered the release of a holdback to a contractor in violation of *The Builders' Lien Act*.
- SRC had entered into a contract for the remediation of the Gunnar Mine Site that included some work at a fixed price and some work on a time and materials basis.
- The contractor applied for a certificate of substantial performance under *The Builders' Lien Act* on December 20, 2012 for a partial release of the holdback indicating that the contract had been substantially performed on September 21, 2012.
- SRC released the holdback on the same day as it certified substantial performance of the contract instead of waiting 40 clear days. This was a contravention of clause 43(1)(a) of *The Builders' Lien Act* and, therefore, a wrongdoing under clause 3(c) of *The Public Interest Disclosure Act*.
- The decision to release the holdback early was, however, reasonably informed and made in consideration of the risks SRC would face.
- Since *The Builders' Lien Act* provides a process for SRC to be liable to lien claimants if it releases a holdback early, we found that SRC's contravention would be more appropriately dealt with according to the procedures in *The Builders' Lien Act*. Therefore, we made no recommendations.

2. Lobbying Activities – Project Oz: No Finding of Wrongdoing

- The discloser submitted that SRC hired a consultant to lobby the government using government funds on a contingency fee basis, which he stated was “illegal under the respective federal and most provincial laws.”
- We found that SRC hired a consultant to lobby the Saskatchewan provincial government for money to purchase/develop software to calculate greenhouse gas emissions, which it intended to licence to schools.
- We determined that the consultant was not paid on a contingency basis. However, even if SRC had paid the consultant on a contingency basis, only 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” is a wrongdoing under clause 3(a) of *The Public Interest Disclosure Act*. There is currently no federal or provincial Act or regulation prohibiting SRC from engaging a lobbyist to lobby the provincial government on a contingency fee basis. Since SRC did not contravene an Act or regulation, it did not commit a wrongdoing under clause 3(a) of the Act.

Disclosure 5 – The Argentina Project: No Finding of Wrongdoing

- The discloser alleged that SRC initiated a project that involved SRC conducting business in Argentina, which the discloser believes is a contravention of *The Research Council Act*.
- We found that SRC did provide consulting services to a company in relation to remediation services being carried out in Argentina.
- We noted that in recent years, SRC has been made aware that there is an argument that *The Research Council Act* does not provide it with the authority to carry on business extra-provincially.
- Since there are legal arguments either way, we determined it would not be appropriate to make a finding that SRC has contravened *The Research Council Act* and thereby committed a wrongdoing under clause 3(a) of *The Public Interest Disclosure Act*.
- We suggested to SRC that it take steps to clarify its legislative authority to operate extra-provincially.

Systemic Mismanagement – No Finding of Wrongdoing

- Some of what SRC did (or did not do) in relation to the events disclosed could be characterized as falling below the standards that public institutions should strive to meet.
- However, none of SRC's actions and decisions in relation to any of the disclosures were motivated by bad faith or done for an improper purpose, such as for personal gain. Further, a reasonable member of the public would not be concerned that SRC's ability to carry out its mandate was ever in jeopardy.
- The cumulative effect of these actions and decisions do not support a finding of repeated reckless behaviour that departs so significantly from acceptable standards and practices that a reasonable member of the public would be shocked at the lack of integrity the behaviour shows, or would be seriously concerned that behaviour is affecting SRC's (or a significant part of SRC's) ability to carry out its mandate. Therefore, we concluded that the cumulative effect of these actions and decisions at SRC did not amount to gross mismanagement under *The Public Interest Disclosure Act*.

What is “gross mismanagement”?

The Public Interest Disclosure Act states that “gross mismanagement of public funds or a public asset” is a wrongdoing. So what is “gross mismanagement”?

Gross mismanagement is more than simple misuse or mismanagement. Whether wilful, reckless, or negligent, and whether related to a single grievous event or a series of recurring or systemic events, gross mismanagement is characterized by a significant departure from established standards for the efficient management of public funds or assets that would shock or seriously concern an informed, reasonable member of the public.

An assessment of whether behaviour amounts to gross mismanagement should consider the following questions:

- Did the alleged wrongdoer deliberately engage in behaviour for an improper purpose? For example, did the alleged wrongdoer exercise a power or discretion conferred by an act, regulation or public policy for an improper purpose, such as to promote private or personal interests? Wilful misconduct motivated by interests other than serving the public interest or carrying out a public mandate (that is, acting in bad faith) is a strong indication gross mismanagement may be occurring.
- If the behaviour was not motivated by bad faith, does it nevertheless indicate a wilful, disdainful, reckless, or indifferent disregard of established policies, practices and procedures? The more behaviour departs from established standards, policies or accepted practices, the more likely it is gross mismanagement.
- Was the behaviour engaged in repeatedly, frequently or in a systematic fashion? Behaviour that is engaged in repeatedly and often is more likely to indicate gross mismanagement.
- What adverse effects did the behaviour have on the government institution or the department, division or program area? Did it have a significant negative effect, or could it negatively affect the organization's ability to carry out its mandate? Did it have a significant negative effect on the organization's employees or clients, or on the public trust?
- What position did the alleged wrongdoer hold? What degree of trust was placed on the alleged wrongdoer and what discretion was granted to the alleged wrongdoer to carry out his or her public responsibilities or duties? People given a higher degree of trust or greater discretion are expected to display a higher degree of trustworthiness and good judgment.
- Was the behaviour so egregious that its seriousness is not debatable among reasonable, informed observers? Would it shock or seriously concern a reasonable member of the public?

Not all of these questions need to be answered to support a finding of gross mismanagement and they are not the only questions that should be considered. Each set of circumstances needs to be assessed separately.

Statistics

INQUIRIES AND DISCLOSURES

When a public servant makes a disclosure under *The Public Interest Disclosure Act*, the first step is to conduct an assessment to determine whether the allegations fit the definition of a wrongdoing under the Act. If they do, we will determine the most appropriate course of action: we might see if there are steps we can take to help resolve the matter within the government institution; we might refer the matter to the government institution to deal with under its internal disclosure procedures; or we might conduct an investigation. At the end of 2014, we carried over one investigation, and four disclosure assessments. The investigation was completed and two of the four assessments were opened as investigations. Two disclosures did not pass the assessment stage and were closed. The two remaining investigations are still in process.

We received six disclosures and one complaint of reprisal in 2015. Four disclosures were referred to the government institution to investigate, the complaint of reprisal was investigated and closed, and two disclosures remained open: one is under investigation and one is undergoing assessment for possible investigation. In total, three investigations and one assessment are being carried over into 2016.

	2015	2014	2013	2012
INQUIRIES				
Within Jurisdiction	6	5	10	4
Outside Jurisdiction	1	3	4	3
TOTAL INQUIRIES	7	8	14	7
DISCLOSURES / COMPLAINTS OF REPRISAL	7	4	2	0
TOTAL	14	12	16	7

Budget and Staff



FINANCES

The Office of the Public Interest Disclosure Commissioner operates as part of Ombudsman Saskatchewan. The Ombudsman receives funding to carry out the Commissioner's mandate under *The Public Interest Disclosure Act*, which is to provide advice to and investigate disclosures of wrongdoings and complaints of reprisals from public servants. The Ombudsman's estimates and financial statements encompass all financial aspects associated with the Ombudsman's role, including the Public Interest Disclosure Commissioner. The Ombudsman's Audited Financial Statements are available at www.ombudsman.sk.ca.

STAFF

As a combined Office, Ombudsman Saskatchewan and the Office of the Public Interest Disclosure Commissioner share staff. The staff list for 2015 is in the Ombudsman section of this report.