

June 2018

Special Report

Ten-Year Review of the
**Public Interest Disclosure
(Whistleblower Protection) Act**
2007-2017

Manitoba  Ombudsman

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Introduction

“Whistleblowing,” as the term applies to the public service, typically occurs when an individual makes a report alleging government wrongdoing to an authority. Even in situations where wrongdoing is not ultimately found, whistleblower allegations can assist in bringing a concern to the attention of a public body that may not have previously been aware of the issue. It also helps increase accountability and oversight of public bodies.

Many governments across the world have implemented whistleblower laws to provide a mechanism by which whistleblowers can bring forward allegations of wrongdoing. As the act of whistleblowing can carry professional risk for the whistleblower, many of these laws have also incorporated protections for those bringing forward allegations.

On April 2, 2007, Manitoba’s Public Interest Disclosure (Whistleblower Protection) Act came into force, making Manitoba the first province in Canada to introduce stand-alone whistleblower legislation. Since its enactment, the act has strengthened the oversight of Manitoba’s public bodies and civil servants by providing a way for Manitobans to bring forward concerns about potential wrongdoings in the public service. The act has been used as a model for public interest oversight legislation created throughout Canada.

It takes courage for an individual (referred to in the act as a “discloser”) to come forward with allegations of wrongdoing, particularly if they are making a disclosure against their employer. We have found that the vast majority of disclosures to our office are made in good faith (i.e. with an honest purpose), even when wrongdoing is not ultimately found.

Disclosures can also have a significant impact on the individual whose actions are the subject of the allegations as well as on the workplace under investigation. Our investigations under the act are therefore conducted in an impartial and unbiased manner to ensure fairness for all involved in the process. All findings are based on an objective analysis of the evidence, and we do not act as advocates for either the discloser or the public bodies involved.

It is the practice of Manitoba Ombudsman to refrain from publicly releasing details of our investigations under the Public Interest Disclosure (Whistleblower Protection) Act. We maintain this level of confidentiality out of consideration for the sensitive and serious nature of the allegations brought forward and the importance of protecting the identity of disclosers. Following the 10-year anniversary of the act, we released this special report to explain the function of the act and our responsibilities in investigating allegations of wrongdoing, as well as to inform the public of recent amendments to the act.

The Public Interest Disclosure (Whistleblower Protection) Act

As set out in section 1 of the act, the statute was created for two primary purposes: to facilitate the disclosure and investigation of significant and serious matters in or relating to the public service (referred to as “wrongdoings”), and to protect individuals who make such disclosures against reprisal action.

The act sets out four types of wrongdoing:

- (a) an act or omission that constitutes an offence under a law
- (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 part of the ordinary course of an employee’s work)
- (c) gross mismanagement, including of public funds or a public asset (government property)
- (d) knowingly directing or counselling another person to commit a wrongdoing

The act provides that disclosures of wrongdoing can be made by employees of the public service, contractors, and other members of the general public. Employees may make disclosures internally to their supervisor or to their organization’s designated officer who is responsible for receiving such complaints. Organizations within the jurisdiction of the act are required to have internal procedures in place to receive and investigate disclosures. Disclosures can also be made directly to the ombudsman.

Public Bodies Under the Jurisdiction of the Public Interest Disclosure (Whistleblower Protection) Act

Hundreds of public bodies currently fall under the jurisdiction of the act, including:

Provincial government departments, offices, and agencies

Crown corporations (ex: Manitoba Hydro, Manitoba Public Insurance)

Independent offices of the Legislative Assembly of Manitoba (ex: Office of the Auditor General Manitoba, Manitoba Advocate for Children and Youth, Manitoba Ombudsman)

Boards (ex: Workers Compensation Board, Social Services Appeal Board)

Commissions (ex: Residential Tenancies Commission, Human Rights Commission)

Child and Family Services agencies and authorities

Regional health authorities

Hospitals and other medical facilities

Personal care homes, residential care facilities, social housing services

Correctional centres

Universities and colleges

Assessing Disclosures

Since 2007, we have continually improved our internal procedures for handling disclosures of wrongdoing made directly to our office under the act. Once we confirm that the matters alleged in a disclosure involve a public body under the act's jurisdiction, we assess whether the allegations, if true, would be a significant and serious matter requiring investigation. The act also requires that a disclosure must be made in good faith, which we interpret to mean that it is made with an honest belief and without an intent to deceive.

If we determine an allegation discloses a matter that is sufficiently significant and serious in nature, we will commence an investigation under the act. We have broad powers under the act to obtain and review documentary evidence, and to interview witnesses. We then conduct a thorough analysis of all relevant evidence in conjunction with any applicable laws, policies, or regulations. Our findings and any recommendations made are set out in our investigation reports.

The act provides some specific circumstances in which we may decline or discontinue an investigation. Although not all disclosures result in an investigation, each disclosure is still reviewed thoroughly. If an allegation is more appropriately handled through a process provided for under a different law, we may refer the matter to the appropriate public body. We may also do this where an allegation is not sufficiently serious to warrant an investigation under the act but involves issues that should be brought to the attention of the organization named in the disclosure. That organization may conduct its own internal review, if appropriate.

When we determine a matter does not warrant investigation, we often provide suggestions to the discloser regarding the appropriate avenue to use to pursue their concerns. We may suggest that the discloser pursue available grievance processes, either internally or through an external office or agency. This is often the case when a disclosure concerns human resource or employment matters, which are better handled through other avenues.

In addition to handling disclosures submitted to our office, our investigators also provide information in response to a substantial number of inquiries from employees, contractors, and the general public each year. The act provides that employees of the public service may seek advice about making a disclosure from their supervisor, designated officer, or the ombudsman. Employees cannot, under the act, be subjected to reprisal action for having sought advice. "Reprisal," as defined by the act, includes a disciplinary measure, a demotion, termination of employment, any measure that adversely affects the employee's employment or working conditions, or a threat to do any of these actions. Employees are not required to make a disclosure after seeking advice.

Growth and Trends

Number of Disclosures

From 2007 to 2017, the majority of disclosers who have brought forward allegations of wrongdoing to our office have been employees of the provincial public service.

The majority of disclosures involve provincial government departments. Other public bodies often identified in disclosures received by our office are:

- Child and Family Services agencies and authorities
- Hospitals and regional health authorities
- Agencies that receive provincial funding
- Personal care homes
- Universities and colleges

While our office received a minimal amount of disclosures under the act for the first few years of its existence, we experienced a substantial increase in both inquiries and disclosures in 2013. In our view, this may have been the result of public knowledge of a previous investigation regarding allegations of wrongdoing within a personal care home.

Since 2014, the number of disclosures received each year has continued to increase. We believe this can be attributed to a rise in awareness of the act and its purposes throughout the public service and the general public. This growth in awareness may in turn be the result of increased media attention to whistleblower matters both within Canada and worldwide.

Disclosures Made to Manitoba Ombudsman 2007-2017

Year	Number of Disclosures	Number of Investigations Opened ¹
2007	2	1
2008	3	-
2009	-	-
2010	8	1
2011	1	1
2012	5	2
2013	47	7
2014	16	2
2015	18	3
2016	23	4
2017	32	3
TOTAL	155	24

¹ Multiple disclosures can form the basis for the same investigation.

Investigations and Findings of Wrongdoing

Since 2007, our office has investigated a range of wrongdoing allegations under the act. We have found, however, that the disclosures brought forward most often allege some form of gross mismanagement or a danger to life, health or safety of persons.

We do not often find wrongdoing in our investigations. There is a high threshold required to find that, on a balance of probabilities, an action was significant or serious enough to be considered a wrongdoing as defined by the act. Even if brought forth in good faith, an allegation is not proof of a wrongdoing in and of itself. All allegations are assessed based on the relevant evidence and are sometimes found to be unsubstantiated. From 2007 to 2017, we made a finding of wrongdoing in three cases (which are noted below).

Some examples of allegations we have investigated are as follows:

Mismanagement of funds and/or assets:

- Mismanagement of public funds within a personal care home, as well as conflict of interest and failure to follow tendering procedures (wrongdoing found)
- Unauthorized use of government equipment and property for an employee's personal profit (wrongdoing found)
- Improper use of employee credit cards and government expense claim forms to purchase office equipment
- Abuse of overtime hours within a government department
- Unauthorized use of government equipment and property for an employee's private business

Health and safety issues:

- Danger to patients caused by faulty hospital equipment and inadequate procedures to address equipment failure (wrongdoing found)
- Danger to employees and patients caused by inappropriately high levels of radiation emitted from medical equipment
- Failure to investigate and remedy unsafe worksite conditions and workplace procedures

Concerns regarding vulnerable persons:

- Quality of resident care in personal care homes, including inadequate staff qualifications and training, or staff shortages
- Abuse of patients by medical staff at a health-care facility
- Risk to children in care resulting from failure to follow service standards
- Danger to health of incarcerated individuals regarding diet and affected health conditions

Recommendations for Corrective Action

Regardless of whether or not wrongdoing is found, our office can make recommendations to address issues identified in the course of an investigation. This provides us with an opportunity to bring about positive change and improvement to the public service. We strive to recommend action which is practical and which promotes fairness and best practices within the particular public body involved. Our recommendations are almost always accepted by public bodies and we monitor implementation in most cases.

Number of Recommendations Made 2007-2017 – By Year	
2007	-
2008	10
2009	-
2010	-
2011	3
2012	10
2013	-
2014	-
2015	2
2016	17
2017	33
Total	75

Number of Recommendations Made 2007-2017 – By Subject	
Develop policies/procedures: asset management, financial controls	24
Develop policies/procedures: medical or clinical-related processes, documentation	8
Develop policies/procedures: employee monitoring and oversight	2
Develop policies/procedures: other	8
Revise internal policies to align with other government policies/legislation	9
Review and/or adjust staffing levels	2
Train staff on policies/procedures	12
Engage external body to conduct additional review/investigation	3
Conduct internal review/investigation	5
Develop internal investigation and reporting procedures	2
Total	75

Looking Ahead: Recent Amendments

In 2013, an external review of the act was undertaken on the recommendation of the Office of the Auditor General Manitoba. The purpose of the review was to determine whether the act, which was still relatively new at the time, was functioning effectively. In 2014, a report was issued setting out the findings of the review and making recommendations for improvement of the legislation. As a result of the report, our office made recommendations to the Manitoba government for potential amendments to the act. The proposed amendments were introduced in December 2017 and the amended legislation was passed on June 4, 2018.

Expanded Jurisdiction – School divisions and school districts, as well as their employees, are now within the jurisdiction of the act. Additionally, municipalities may opt to come under the act’s jurisdiction by regulation.

Clarification of Roles and Powers of Designated Officers – The amended act clarifies the duties and powers of designed officers within public bodies, including the requirement to take steps to maintain confidentiality of a discloser’s identity. Our office will have the ability to ensure that all public bodies that fall within the jurisdiction of the act have effective procedures in place to receive, handle, and investigate disclosures of wrongdoing as required by the act.

Confidentiality Protections – In addition to clarifying a designated officer’s responsibility to protect a discloser’s identity, the amended act prohibits the disclosure, by any person, of information in a civil court or administrative tribunal proceeding that could be expected to reveal a discloser’s identity.

Report Distribution –The 2014 review identified the concern that there may be circumstances in which providing the same investigation report to all parties may not be appropriate, as originally required by the act. For example, it may not be appropriate for a disclosing employee to receive the full investigation report in matters where we do not find wrongdoing but make recommendations for corrective action to address other issues identified in an investigation. To address this concern, the amended act provides that while the ombudsman must inform the discloser about the results of the investigation, the ombudsman may do so in the manner and at the time he or she considers appropriate.

Reprisal Investigations – Under the act, it is an offence for an employee to be reprisal against for making a disclosure, seeking advice about a disclosure, or participating in an investigation. Certain reprisal protections regarding contract renewal are also provided for government contractors who have provided information to our office about an alleged wrongdoing.

Under the original act, reprisal complaints were required to be submitted to the Manitoba Labour Board for investigation. The board could then review the matter and order an appropriate remedy as provided by the act, including reinstatement, compensation, an order directing an employer to cease a reprisal activity, or any other corrective action necessary to address the reprisal.

Under the terms of the amended act, our office is responsible for receiving and investigating allegations of reprisal. In doing so, we have the same powers to make findings and recommendations as in our wrongdoing investigations. If a discloser is not satisfied with the outcome of our reprisal investigation or the employer's implementation of our recommendations for corrective action, the discloser may make a further complaint to the Manitoba Labour Board. In such situations, the board will conduct a fresh review of the matter and make an order as it considers appropriate.

Our office will be reviewing and redeveloping our procedures to ensure that best practices are employed as we exercise these additional responsibilities under the amended act.

Conclusion

We hope that the Public Interest Disclosure (Whistleblower Protection) Act will continue to serve as a model for other jurisdictions that are in the process of creating, implementing, or reviewing their own public interest disclosure legislation. We are confident that the act, as recently amended, will strengthen our ability to shape better governance and administration within the public service for years to come.