Inform. Protect. Prevent.

Balancing the duty of loyalty to the employer and the right to freedom of expression



2009-2010 ANNUAL REPORT

Office of the Public Sector Integrity Commissioner of Canada 60 Queen Street, 7^{th} Floor Ottawa, ON K1P 5Y7

Tel.: 613-941-6400 Toll free: 1-866-941-6400 Fax: 613-941-6535

© Minister of Public Works and Government Services Canada 2010

Cat. No.: PG1-2010E-PDF ISBN: 978-1-100-15810-5

This publication is also available in electronic format at www.psic-ispc.gc.ca.

The Honourable Noël A. Kinsella Speaker of the Senate The Senate Ottawa, Ontario K1A 0A4

Dear Mr. Speaker:

I have the honour of submitting to you the third Annual Report of the Office of the Public Sector Integrity Commissioner of Canada, which is to be laid before the Senate in accordance with the provisions of section 38 of the *Public Servants Disclosure Protection Act*.

The report covers the fiscal year ending March 31, 2010.

Yours sincerely,

Christiane Ouimet

Christiane Quine

Public Sector Integrity Commissioner of Canada

The Honourable Peter Milliken, M.P. Speaker of the House of Commons House of Commons Ottawa, Ontario K1A 0A6

Dear Mr. Speaker:

I have the honour of submitting to you the third Annual Report of the Office of the Public Sector Integrity Commissioner of Canada, which is to be laid before the House of Commons in accordance with the provisions of section 38 of the *Public Servants Disclosure Protection Act*.

The report covers the fiscal year ending March 31, 2010.

Yours sincerely,

Christiane Ouimet

Phristiane Quine

Public Sector Integrity Commissioner of Canada

Table of Contents

	Excerpt from the <i>Public Servants Disclosure Protection Act</i>
	Our Vision, Our Mission, Our Values
	An Open Letter from the Commissioner
	Overview of the Annual Report
1	Decision-making Guide for Public Servants Considering Making a Disclosure 10
2	Investigations and Inquiries
3	Responses to Vulnerabilities in the Federal Public Sector
4	Public Disclosure: the Canadian Model
5	Looking Forward



Public Servants Disclosure Protection Act

The federal public administration is an important national institution and is part of the essential framework of Canadian parliamentary democracy;

It is in the public interest to maintain and enhance public confidence in the integrity of public servants;

Confidence in public institutions can be enhanced by establishing effective procedures for the disclosure of wrongdoings and for protecting public servants who disclose wrongdoings, and by establishing a code of conduct for the public sector;

Public servants owe a duty of loyalty to their employer and enjoy the right to freedom of expression as guaranteed by the *Canadian Charter of Rights and Freedoms* and this Act strives to achieve an appropriate balance between those two important principles.

—Excerpt from the Preamble Public Servants Disclosure Protection Act

Office of the Public Sector Integrity Commissioner of Canada

Our Vision

Our vision is to increase public confidence in our public institutions and in the integrity of public servants.

Our Mission

The Office of the Public Sector Integrity Commissioner of Canada will:

- I build an effective and credible organization where public servants and all citizens can, in good faith and in confidence, raise their concerns about wrongdoing:
- I assist federal government organizations in preventing wrongdoing in the workplace;
- establish Canada as a world leader in the promotion of integrity in the workplace.

Our Values

- I Integrity in our actions and processes
- Respect for our clients and employees
- **Fairness** in our procedures and our decisions
- Professionalism in the manner we conduct ourselves and in our work

Our Approach to our Mandate

The mandate of the Office of the Public Sector Integrity Commissioner of Canada is to establish a safe, confidential and independent mechanism for public servants or members of the public to disclose potential wrongdoing in the federal public sector. Our Office investigates disclosures of alleged wrongdoing and complaints of reprisal. It also protects public servants from reprisal for making such disclosures or cooperating in investigations under the *Public Servants Disclosure Protection Act* (the *Act*).

Our work is guided by three principles: inform, protect and prevent.

Inform the public sector and citizens about our Office, what we do, how and why. Just as important as understanding what we do is knowing what we do not do: we do not reconsider decisions of other bodies; we do not act when another body is better placed to take action on an issue; we do not represent individuals in those other processes; we do not oversee the work of departmental Senior Officers responsible for internal disclosure; we do not have jurisdiction outside the public sector; we are not an Ombudsman.

Protect the public interest; protect, to the extent possible, the identity of all persons involved in a disclosure process; protect the information collected or created in regard to a disclosure; protect the right to fairness of all persons involved in a disclosure or a reprisal case; protect public servants from reprisal; protect the integrity of our public institutions.

Prevent wrongdoing by acting quickly and efficiently when problematic situations are brought to our attention; by identifying systemic problems that might lead to wrongdoing; by supporting open dialogue in public sector organizations; by supporting a culture of "right-doing"; by establishing solid partnerships in the public sector; by encouraging an ethic of professionalism in the federal public sector.

Building public confidence in our public institutions and in the integrity of public servants is **a shared responsibility**. It is a collective goal to which we are strongly committed, together with our many partners.

"I want to take this opportunity to say to anyone considering making a protected disclosure: act with the courage of your convictions."



An Open Letter from the Commissioner

In my last Annual Report, I shared some thoughts on the difficulties faced by individuals who choose to come forward to disclose wrongdoing. This year, I want to speak directly to you, the potential disclosers who are considering stepping forward and wondering whether you should.

The answer to your question is an emphatic "yes". I recognize that the stakes are high and that the decision is not an easy one. I recognize that our organization is still new, and you may be waiting to see how my Office handles other cases before you come forward with yours. Let me say that I understand your feelings and that I realize they are not a reflection of any lack of depth of commitment or professionalism on your part or on the part of the other hundreds of thousands of public servants. I admire and support your work in serving the public interest. But it is exactly in the spirit of such admiration and support that I tell you that you can come forward, in full confidence that our response will be guided at all times, and to the best of our ability, by the public interest. For it is the public interest that motivates you; this is the essence of public sector disclosure.

Our shared goal is to strengthen our public institutions and to enhance confidence in them. As the Preamble of our legislation, the *Public Servants Disclosure Protection Act* (the *Act*), clearly states: "the federal public administration is an important national institution and is part of the essential framework of Canadian parliamentary democracy." These institutions are vital to the health, security and prosperity of Canadians. The integrity of our public sector is a hallmark of Canada on the international stage.

I want to take this opportunity to say to anyone considering making a protected disclosure: act with the courage of your convictions. You are serving the public interest when you bring attention to actions that impede our collective responsibility to serve Canadians honestly, effectively and fairly.

If you do come forward, you will be protected within the framework of the Act. Your confidentiality will be protected to the fullest extent possible, your rights to procedural fairness and natural justice will be respected, and your case will be dealt with as informally and expeditiously as possible. You will also have the satisfaction of serving the public good and contributing to the continued integrity of the public sector in which you are an important player. Just as your rights will be protected, so too will those of others involved in the process, including those whose actions are called into question. My Office is an independent body.

We are not a representative of nor advocate for any individual; rather, we are an advocate for the public interest

Recognizing the very difficult choices facing a potential discloser, my Office has developed a guide that will help you through the decision-making process. We are also available at all times to discuss any concerns or questions you might have.

My respect for you is informed by my understanding of the challenges you face as a potential discloser, and I wish to support you in making the right choice: right for you and right for all of us. My commitment is to provide this support.

Christiane Ouimet

Public Sector Integrity Commissioner of Canada

"If you do come forward, you will be protected within the framework of the Act."

Inform. Protect. Prevent. Balancing the duty of loyalty to the employer and the right to freedom of expression

Overview of the Annual Report

Chapter 1 – Decision-making Guide for Public Servants Considering Making a Disclosure

To support public servants who are considering making a disclosure, we developed a guide to assist them in this difficult decision. The guide presented in the first chapter builds on existing models developed by our international counterparts and is the result of widespread consultations. We will continue to refine and adapt this guide, as needed, to ensure it continues to be as useful as possible.

Ultimately, what is most important to us is to provide guidelines for

potential disclosers so that they can make a well-considered and informed decision that takes into account all their interests, rights and responsibilities.

Chapter 2 – Investigations and Inquiries

This year, our Office received more inquiries than last year (approximately 50 more). We have become better known among federal public sector employees, as evidenced by the number and the nature of the issues brought to our attention. These issues covered a wide range of activities within the

public sector. This year nine new investigations were launched. The complexity of the files we received has also increased.

The approach taken by our Office in implementing its sensitive and important mandate is proving its mettle. Each case is carefully assessed on its own merits. If a case is within our jurisdiction, we then determine what further action is needed to decide whether an investigation is warranted. We are sensitive to the effects of our actions on individuals and organizations, but we will also not hesitate to use the powers given to us under the *Act*. Our ultimate goal is the protection of the public interest.

Chapter 3 – Responses to Vulnerabilities in the Federal Public Sector

Responding to situations as they occur is undoubtedly important. However, we must also be able to step back and see the bigger picture. What are the conditions and systemic vulnerabilities that could give rise to wrongdoing?

In last year's report, we discussed the vulnerabilities of small federal agencies. Our Office has continued its efforts to examine this issue in further detail and to bring it to the attention of central agencies, as well as the Group of Heads of Federal Agencies.

We also consulted the Association of Professional Executives of the Public Service of Canada (APEX) and the National Joint Council of the

Public Service of Canada to obtain their views on conditions that lead to an environment where wrongdoing could occur and on possible approaches to mitigating these vulnerabilities. A summary of these consultations is included in Chapter 3. Over the next year, we will continue our consultations in order to examine some of these issues in further detail.

Chapter 4 – Public Disclosure: the Canadian Model

How does the Canadian public disclosure regime compare to that of other countries? What are its unique features?

We have consulted some of our international counterparts. We have benefited from research and analysis done by some of Canada's leading experts and academics in the field of public sector disclosure.

In this Chapter, we discuss the Canadian model in the context of four other countries: the United States, the United Kingdom, New Zealand and Australia.

Chapter 5 – Looking Forward

The coming year will be particularly important for our Office. On the agenda are preparations and recommendations for the five-year review of the *Act*, which will be carried out by the Treasury Board Secretariat in 2012; workshops with our provincial counterparts and departmental Senior Officers; a look ahead at "machinery of government"

Building public confidence in our public institutions [...] is a collective goal to which we are strongly committed, together with our many partners.

An emphasis on prevention and cultural change is essential. The value of a disclosure regime is measured by how it protects the public interest and ultimately prevents wrongdoing from occurring in the public sector.

issues; and, further examination of the special risks facing Crown corporations.

We are also increasingly preoccupied by a growing impression that public servants cannot express their concerns freely and openly in their workplace and that they are afraid to question authority. Such a work atmosphere is not conducive to the disclosure of wrongdoing. Freedom of expression, as guaranteed by the Canadian Charter of Rights and Freedoms, is essential for Canadian democracy to work. As public servants, we must balance our right to freedom of expression with our duty of loyalty to our employer in order to serve the public interest.

Our Office encourages the prevention of wrongdoing in the public sector. When wrongdoing occurs, we respond to it effectively, quickly and appropriately. Reprisals are expressly prohibited by the Act, and we respond to them immediately and forcefully. This is our mandate from Parliament.

We never lose sight of the fact that the vast majority of public servants act with integrity and professionalism in accordance with high ethical standards. Our public service is a hallmark of Canadian democracy and a model for the rest of the world. It is because of these high standards that we cannot allow ourselves to ignore wrongdoing that could undermine public trust in our work. We have a collective responsibility to safeguard that trust.

"One of the greatest challenges of the Public Sector Integrity Commissioner is to demonstrate that a process with an external regulatory aim can also play an active role in developing ethical capacities of public officials. The Office can address this challenge by promoting ethical risk-management. Ethical risks, when neglected, lead to misconduct."

Deciding to disclose a wrongdoing is not easy. It takes careful reflection and courage.

Decision-making Guide for Public Servants Considering Making a Disclosure

No one wakes up one morning and decides to be a discloser; rather, it is the result of a variety of circumstances that create the challenging situation of having to consider coming forward.

You may have witnessed actions that seem contrary to the public interest or have information that triggers your sense of professionalism. You might think things will work themselves out over time. Or maybe you think that because other people were also witnesses, they will take action instead.

Mistaken perceptions

The vast majority of public servants who disclose wrongdoing do not consider themselves to be heroes.

Studies show that most disclosers are well-intentioned employees, loyal to their organization, and who do not wish to stand out or want public attention. They just want to do their work with professionalism, and they care deeply about their organization.

A difficult decision

Deciding to disclose a wrongdoing is not easy. It takes careful reflection and courage.

Over the past year, we have consulted widely with stakeholders to determine the key factors to be considered when making this decision. We have been informed by models from New Zealand and Australia, former disclosers, public service values and ethics advisors, focus groups, public servants and others. The result is a decision-making guide to assist potential disclosers. This guide is available on our website (www.psic-ispc.gc.ca).

No guide is perfect or complete and there is no one-size-fits-all solution. Since each case is unique, we are also available to assist potential disclosers in their decisionmaking on an individual basis.

Making an informed decision

 Do you think something is wrong? – Check the facts

Witnessing wrongdoing can trigger a
wide range of emotions. It is
important to take the time to step back and check the facts as objectively as possible. What has led you to believe that there is something wrong with a decision, a process or the way in which a public servant has behaved at work? Former disclosers have told us that having the facts is key to addressing wrongdoing appropriately.

 Does your concern constitute a wrongdoing under the Act? – Keep in mind the public interest

The alleged wrongdoing must meet one of the definitions under the *Act* (see section 8 of the *Act*).

Rarely will a person face an ethically simple and clear choice between speaking out or staying silent. There may be alternatives to formal disclosure that are more appropriate avenues for addressing the issues if they are not a matter of public interest under the *Act*. Departmental Senior Officers or our Registrar can help in this regard.

No one discloses wrongdoing simply for the sake of doing so. Wrongdoing is disclosed so that actions may be corrected, that procedures and policies may be improved, and that public trust in the integrity of our public institutions may be strengthened.

- 3. Would it help to talk to your family and trusted friends?
- Use your support network
 Former disclosers have highlighted the importance of discussing their concerns with family and trusted friends. Before deciding to make a

Former disclosers have highlighted the importance of discussing their concerns with family and trusted friends.

You are not obliged to exhaust internal channels before contacting our Office.

disclosure, it is important to consider how it may affect your professional and personal life.

We also encourage potential disclosers to have an informal discussion with us before making a disclosure.

4. What are your options for making a protected disclosure of wrongdoing? – Know your options

You may make a disclosure to your supervisor, the designated Senior Officer in your organization or directly to our Office¹. You are not obliged to exhaust internal channels before contacting us. Your decision to disclose internally or externally to our Office should be based on your comfort level.

You may consult our Office with confidence and in complete confidentiality at any time.

What should you do if you experience reprisal in your workplace after making a disclosure? – You are protected

The fear of reprisal is real. However, as the very title of the *Public Servants Disclosure Protection Act* indicates, protecting public servants from reprisals is a key element of Canada's disclosure regime.

Our legislation enables us to take strong and immediate action when you come forward with a complaint. It also provides remedies for people who have been the subject of reprisal, and disciplinary action against those who have taken reprisal.

The positive effect of making a disclosure

The intention of the *Act* is to enhance public trust in our national institutions and in the integrity of public servants. Disclosing wrongdoing can have an overall positive effect on an organization, such as:

- I preventing similar wrongdoings from occurring in the future;
- I improving operations;
- fostering a more productive and open work culture;
- I contributing to a safer work environment.

Other initiatives in support of potential disclosers

We bring together, on a monthly basis, a group of Senior Officers for an informal discussion about disclosure practices and related activities in their respective departments or agencies. Senior Officers have told us this exchange of best practices has enhanced their ability to assist potential disclosers.

Another initiative that we have launched is the Senior Officers' Support (SOS) network. SOS is a small, experienced and dedicated group of Senior Officer volunteers who are available at any time to help,

¹ The Act allows some organizations to exempt themselves from the requirement to establish internal disclosure procedures, including the designation of a Senior Officer, if it is not practical for them to do so because of their size. Employees of those organizations can make a disclosure to our Office.

Protecting public servants from reprisals is a key element of Canada's disclosure regime.

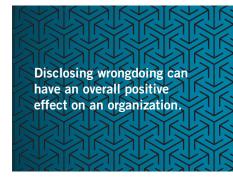
on an informal basis, other Senior Officers with their disclosure cases – while maintaining confidentiality at all times. Acting as a sounding board, SOS volunteers provide suggestions or guidance based on their own extensive experience. SOS was created in answer to a need expressed by the Senior Officer community for an informal means to collaborate with and support each other.

We will continue to engage Senior Officers and managers to assist them with their roles in the disclosure process and to have them share their experiences with us and each other. At the same time, we will work to assist managers and employees in creating a workplace culture that is open to raising concerns, issues or conditions that could lead to wrongdoing. Further research and consultation will inform our ongoing efforts in these areas.

We also welcome stakeholders to contact us with suggestions on other activities we could undertake. We are grateful to those who have offered advice and feedback to date, and we encourage all of you to contribute to the success of our collective mandate.

Conclusion

The vitality of Canadian democracy is supported by public servants who believe that things can change and who have the courage required to address problems that could erode the public interest.



Not every disclosure reveals a potential wrongdoing. Clarifying the facts and the issues for the disclosers, as well as for others whose rights and interests are affected in the disclosure process, is an essential part of our work.

Investigations and Inquiries

In the ongoing evolution of our investigative mandate, and as our experience grows, we have had the opportunity to make observations about the continuing progress of our Office toward achieving some important goals:

- our message is reaching its target audience;
- I our stakeholders have a clearer understanding of our mandate and our approach;
- I our collaborative relationship with organizations within our jurisdiction is more firmly established; and
- more people are coming forward with more complex disclosures of wrongdoing.

As with any new organization, we continue to develop our operational and policy framework to ensure the flexibility necessary to respond to new and often unique cases. This requires ongoing and careful analysis of our statutory mandate and the strategic development of operational policies. We must ensure that we respond to disclosures of wrongdoing and complaints of reprisal in a way that acknowledges the consequences of our actions on both individuals and organizations, and the importance of enhancing and maintaining confidence in public institutions.

Several cases this year have verified and validated the work we carried out in previous years. They have underscored that new issues will continue to arise and require ongoing effort and clarification on the interpretation and implementation of the *Act*. These issues include some key defining features of the public sector disclosure and reprisal regime that Parliament created to protect the needs and interests of Canadians:

- I our jurisdiction is limited to the public sector as defined by the *Act*, which covers most, but not all federal public organizations and employees:
- I we were not established to duplicate or interfere with other processes under other Acts, but rather to complement them;
- we are not an appeal body for decisions made under other processes;
- I wrongdoing is defined broadly, but not all actions that create

- dissatisfaction or disagreement fall within the *Act*'s definition;
- we act on solid and dependable information, and if we do not have it we will work to obtain it;
- I reprisals are serious matters that are part of a larger labour relations context, but for us to act on them, the actions complained of must be the result of either having made a protected disclosure or of having cooperated in an investigation into a disclosure.

There is no doubt that these and other concepts will continue to be tested and clarified as our work continues.

Our Office has considerable discretion under the Act to ensure that, in having jurisdiction over virtually every aspect of the federal public sector, our decisions are reflective of shared public administration and governance values, philosophies and goals. Exercising our discretion responsibly and carefully is not only an expectation - it is our obligation. As our investigation and inquiry work continues, the framework within which we exercise that discretion will continue to develop. Individual cases will provide us with the ongoing opportunity to ensure that our decision-making process is informed by principles of fairness, consistency and reasonableness.

With these ideas in mind, this Chapter highlights key principles derived from our cases this year that demonstrate the ongoing evolution of our work. Exercising our discretion responsibly and carefully is not only an expectation – it is our obligation.

When assessing a disclosure to determine if further action is warranted, including commencing an investigation, the Commissioner will consider the totality of the information provided and the credibility and reliability of the allegations.

Disclosures of wrongdoing

Principle: We will take further action to enable ourselves to make a fully informed and fair decision about how to proceed, including whether to launch an investigation.

Not every disclosure reveals a potential wrongdoing. Clarifying the facts and the issues for the disclosers, as well as for others whose rights and interests are affected in the disclosure process, is an essential part of our work.

The Act states that the Commissioner must "receive, record and review disclosures of wrongdoing to establish whether there are sufficient grounds for further action". Many of our cases require that "further action" be taken, and what this constitutes in any given case depends on a careful and thorough assessment of all relevant considerations, both policy and legal.

It has been our experience that it may be difficult for public servants to gauge the required degree of information that they must provide when making a disclosure. The Act is intended to facilitate the disclosure of potential wrongdoing. It requires that a public servant "provide no more information than is reasonably necessary to make the disclosure". Disclosers should provide us with documents in their possession that are relevant to their disclosure. They are not, however, expected to obtain documents from third parties or other sources, or provide proof of wrongdoing that could otherwise be

obtained through a fact-finding review or an investigation.

It is important that disclosers explain why they believe wrongdoing has occurred. In some cases, public servants may have no documentation supporting their allegations, but their knowledge of the facts and the circumstances of a case make the allegations reliable and capable of being acted upon. It is also important to determine whether the subjectmatter of the disclosure, if proven true, concerns acts or omissions that could potentially constitute wrongdoing as defined in the *Act*.

When assessing a disclosure to determine if further action is warranted, including commencing an investigation, the Commissioner will consider the totality of the information provided and the credibility and reliability of the allegations.

After a detailed analysis of the information provided, if the subjectmatter of a disclosure does not point to potential wrongdoing, we will inform the discloser accordingly. In many cases, we will provide the discloser with the opportunity to clarify matters and to provide additional information to ensure a full assessment of the facts. Our approach is to ensure that a discloser is given the chance to bring all relevant information forward for analysis, rather than to accept or reject a disclosure based on its initial formulation.

We had several cases this year in which we worked closely and collaboratively with Senior Officers to clarify key facts and obtain relevant

information. In all cases, we maintain our independent ability to launch and carry out an investigation.

One case in particular serves as a useful illustration of the scope and complexity of determining what constitutes appropriate "further action". Despite the fact that we ultimately determined that we would not act on the majority of the issues raised, there was information that indeed warranted further action. It suggested an unusual situation in the application of relocation and travel expenses, pointing to a possible violation of applicable policies and a potential misuse of public funds.

Before determining if an investigation was warranted, we requested and obtained from the organization key documents, including the rationale for certain management decisions. Upon careful review of the information provided, we determined that these decisions were based on valid and demonstrable operational needs, as presented in a business case approved by the Chief Executive. We determined that an investigation was not warranted in this matter as there was no indication of wrongdoing.

Our approach allows us to consider relevant and determinative information at the earliest opportunity and in the most effective way. While these actions may be considered investigative in nature, they are preliminary to a full investigation under the *Act*. Our decision to take further action is always a carefully considered one. Our approach allows

us to respond to the legitimate concerns of a public servant who discloses an alleged wrongdoing in good faith.

Principle: The Act requires us to carefully weigh our role in matters of public policy-making.

Our Office completed a complex investigation into a disclosure first made to the Public Service Integrity Officer (PSIO) under the former Treasury Board Policy on the Disclosure of Information Concerning Wrongdoing in the Workplace. The investigation launched by the PSIO examined serious allegations that a public sector organization had failed to appropriately exercise its delegated ministerial discretion in such a way as to endanger public health and safety. It was also alleged that the approving authority was pressuring employees to render decisions without considering all relevant information available on the subject. An investigation was completed by the PSIO, resulting in the dismissal of all the allegations of wrongdoing on the basis that the approving authority had exercised its discretion appropriately and that there was no evidence of undue pressure on employees.

Judicial review was sought of the PSIO's decision. The Federal Court of Canada set aside the PSIO's findings and ordered a new investigation.

The PSIO began a new investigation, which was continued by

While public servants are not required to establish definitively that a reprisal measure results from a protected disclosure or their cooperation in an investigation, under the Act, they must have reasonable grounds for believing that a reprisal has been taken against them.

our Office after the *Act* came into force in April 2007.

A careful analysis of the complex issues raised was required in the context of the new and specific powers given to our Office under the Act. Our legislation gives the Commissioner the discretion to refuse to deal with a disclosure or to cease an investigation when the subjectmatter of the disclosure or the investigation relates to a matter that results from a "balanced and informed decision-making process on a public policy issue." It is important to note that the PSIO did not have such authority to rely upon when it was carrying out its investigation of this matter.

After an extended factual and legal analysis, it was decided that our Office was not the appropriate mechanism to address the public policy issues raised in the disclosure. Of particular importance in making this decision was the fact that the subject-matter of the disclosure had previously been raised, considered and debated in the legislative and broader public arenas.

Complaints of reprisals

Principle: In considering whether to launch an investigation into a reprisal complaint, we must first consider if there is a link between an alleged reprisal and a protected disclosure.

Key to acting on a reprisal complaint is whether there is information to show that the public servant previously made a protected disclosure of wrongdoing within their organization or to our Office, or cooperated in an investigation into a disclosure, and that the alleged reprisal was taken as a result of this. While public servants are not required to establish definitively that a reprisal measure results from a protected disclosure or their cooperation in an investigation, under the Act, they must have "reasonable grounds for believing that a reprisal has been taken" against them. In most of the reprisal complaints received this year, there was either insufficient or no information to demonstrate this connection.

The Commissioner can refer a complaint to the Public Servants Disclosure Protection Tribunal at the conclusion of an investigation if there are reasonable grounds to believe that a reprisal was taken. If it is clear from the beginning that it is unlikely a link could be made between an alleged reprisal and a protected disclosure, we do not want to take further action that could interfere with or harm a public servant's right to use other recourse mechanisms. If a complaint is dismissed at the conclusion of an investigation, a public servant would very likely be unable to address their issues through another process, for example due to time limitations.

Principle: In dealing with reprisal complaints, it is a shared responsibility to consider options and their consequences.

The *Act* expressly prohibits reprisals; it is an offence to take a reprisal against a public servant. Our Office has the exclusive jurisdiction to investigate reprisal complaints and to refer cases to the Public Servants Disclosure Protection Tribunal, which has comprehensive remedial and disciplinary powers.

A reprisal is, in essence, a matter for which there is often a choice among labour relations recourses. The Act requires public servants to choose between making a reprisal complaint to our Office and pursuing another formal recourse, such as a grievance. Public servants must consider the effect of filing a complaint of reprisal, which precludes them from commencing any procedure under any other Act of Parliament or collective agreement in respect of the alleged reprisal. Our Office has a critical role to play in providing information to assist public servants in making this important decision.

Our decision to take further action or to launch an investigation must be made in consideration of other potential recourses available for actions that could constitute a reprisal. In some cases, the subject-matter of a complaint concerns very specialized areas of public administration, such as human rights, privacy, or occupational health and safety, in respect of which another

organization has specific and substantive expertise. These organizations may also offer more specific remedies or expeditious processes to address a particular matter. The *Act* gives the Commissioner discretion to determine if a complaint has been adequately dealt with, or could more appropriately be dealt with, according to a procedure provided for under another Act of Parliament or a collective agreement. It also prohibits our Office from acting if such a process is already engaged.

In four cases this year, our Office determined that we would not act for these reasons. It was also a factor in the decision to close other cases.

We responded to an increased number of inquiries this year from people considering making a reprisal complaint. In doing so, we took careful effort to provide specific and complete information to ensure that people understood our reprisal jurisdiction and the options available to them in the complicated field of labour relations. In some cases, people make an informed decision not to come to us with a formal complaint.

Our commitment is to provide them with information about our mandate and processes so that they can make clear and confident decisions about their options so that their concerns can be addressed as completely and effectively as possible.

The Act expressly prohibits reprisals; it is an offence to take a reprisal against a public servant.

General Inquiries

Total number of general inquiries received and responded to in FY 2009-10 ⁽¹⁾		208
Disclosures		
Total number of disclosures of wrongdoing (2009-10)		71
Number of disclosures of wrongdoing carried over from previous years	15	
Number of disclosures of wrongdoing received in 2009-10	56	
Active disclosure files		21
Currently under review ⁽²⁾	15	
Currently under investigation	6	
Closed disclosure files ⁽³⁾		50
After review	47	
After extended examination, informal case resolution/corrective measures as part of an investigative process	1	
After formal investigation ⁽⁴⁾	2	
Number of recommendations made after an investigative process, including a formal investigation	0	

Reprisals(5)

Total number of reprisal complaints (2009-10)		19
Number of reprisals carried over from previous years ⁽⁶⁾	3	
Number of reprisals received in 2009-10	16	
Active reprisal files		4
Currently under admissibility review	2	
Currently under formal investigation	2	
Currently under conciliation	0	
Currently before the Public Servants Disclosure Protection Tribunal	0	
Closed reprisal files ⁽⁷⁾		15
After admissibility review	15	
After investigation	0	
After conciliation	0	
Further to decisions of the Public Servants Disclosure Protection Tribunal	0	

It should be noted that the statistics provided do not include internal disclosures within public sector organizations, which are reported through the Chief Human Resources Officer at the Treasury Board Secretariat.

Explanatory Notes

- All requests for information about the *Act* and procedures used by our Office concerning disclosures of wrongdoing and reprisal complaints from public servants and members of the public.
- The review process, in many cases, involves review of extensive documentation, significant and complex factual and legal analysis work to determine admissibility/further action.
- Our Office counts each disclosure opened as a case. We do not count multiple allegations of wrongdoing or categories of wrongdoing reported as separate disclosures.

 Of the 50 disclosure cases closed this fiscal year,
 - 31 were closed as follows, on the basis that the Commissioner did not have jurisdiction
 - 20 were closed because the subject-matter of the disclosure did not meet the definition of wrongdoing or there was insufficient/no information to suggest wrongdoing;
 - 4 were closed because another person or body acting under another Act of Parliament was dealing with the subject-matter of the disclosure other than as a law enforcement authority;
 - 4 were closed because the subject-matter of the disclosure related solely to a
 decision that was made in the exercise of an adjudicative function under an Act of
 Parliament;
 - 3 were closed because the subject-matter of the disclosure was outside the public sector.
 - 8 were closed on the basis that there was a valid reason for not dealing with the subject-matter of the disclosure:
 - 7 were withdrawn by the discloser;
 - 1 was closed because the subject-matter was investigated internally by the organization.
 - 5 were closed on the basis that the subject-matter of the disclosure has been adequately dealt with, or could more appropriately be dealt with, according to a procedure provided for under another Act of Parliament.
 - 2 were closed following an investigation and 1 following an extended examination on the basis that no wrongdoing was found.
 - 2 were closed after being the subject of reconsideration requests.
 - 1 was closed on the basis that the length of time that had elapsed since the date when the subject-matter of disclosure arose was such that dealing with it would serve no useful purpose.
- The commencement of a formal investigation requires a notice to the Chief Executive and others, as required, pursuant to section 27 of the *Act*.

- A reprisal complaint is considered to be filed in a form acceptable to the Commissioner when it is submitted in writing and includes all necessary contact information about the complainant, a clear description of the alleged acts of reprisal, details concerning a related protected disclosure of wrongdoing and supporting documentation.
- When compared to the figure reported in the 2008-09 Annual Report, the number of reprisals carried over from the previous year should be two. We report three reprisal cases carried over from last year to include a file that had been closed in 2008-09 but was reopened upon receipt of further information.
- 7 Of the 15 reprisal complaints that were closed this fiscal year,
 - 1 5 were closed on the basis that the complaint did not stem from a protected disclosure;
 - 3 were closed because the complaint was not filed within the 60 days after the day on which the complainant knew, or ought to have known, that the reprisal was taken;
 - 2 were closed on the basis that the measures complained of did not meet the definition of reprisal:
 - 2 were closed on the basis that the subject-matter of the complaint had been adequately dealt with, or could more appropriately be dealt with, according to a procedure provided for under another Act of Parliament or a collective agreement;
 - 1 2 were closed because a person or body acting under another Act of Parliament or a collective agreement is dealing with the subject-matter of the complaint other than as a law enforcement authority;
 - 1 was closed on the basis that the complainant is not or was not a public servant.

In about half the reprisal cases, there were multiple reasons for closure. In addition to the dominant reason cited above for closing a reprisal file:

- I in 4 cases, there was insufficient or no evidence of a link between a protected disclosure and alleged reprisal measures;
- I in 4 cases, the subject-matter of the complaint had been adequately dealt with, or could more appropriately be dealt with, according to a procedure provided for under another Act of Parliament or a collective agreement; and
- in 1 case, another person or body acting under another Act of Parliament or a collective agreement was dealing with the subject-matter of the complaint.

Promoting a culture of integrity is impossible without consistent leadership and exemplary conduct at the top of the organization.

Responses to Vulnerabilities in the Federal Public Sector

In our Annual Report last year, we examined the systemic vulnerabilities of small federal organizations and Crown corporations and presented a number of recommendations. In the interest of achieving concrete results and maintaining momentum, our Office undertook:

- I further examination of the particular risks in federal agencies; and
- I consultations with union leaders and members of the Association of Professional Executives of the Public Service of Canada (APEX) on systemic conditions in the federal public sector that could lead to wrongdoing.

"Central agencies have undertaken a significant amount of work on risk mitigation strategies, but it could be better coordinated and integrated. With an overall plan, performance could be measured and reported." — Scott Serson, former President of the Public Service Commission

Continuing our work to address the risks within small federal agencies

We identified risks within federal agencies in last year's Annual Report, based on discussions with key stakeholders as well as on our Office's own experience in establishing itself as a new institution. There was a consensus that these issues have been longstanding and that immediate measures are needed to address them.

As part of our prevention agenda, we consulted widely with senior officials in central agencies and the Group of Heads of Federal Agencies. This Group is an informal network of more than 100 federal agencies. boards, commissions, tribunals and Crown corporations. The Group was developed as a forum where heads of these agencies could meet, discuss and communicate as a community of federal leaders. It also serves as a collective voice for the small federal agencies in their discussions with central agencies (such as Treasury Board Secretariat, Finance Canada and the Public Service Commission).

To ensure objectivity, we asked a former Chief Executive to work with us in this initiative by gathering and assessing information directly from the Group and senior officials in central agencies. Based on his consultations, he identified priorities, proposed solutions, and raised additional concerns.

Small departments and agencies raised two primary concerns:

- While there has been some development on governance issues such as human resources, finance and procurement, progress has been slower than anticipated or desired; and
- The current fiscal pressures on Government could lead to a scaling back of work underway and perhaps, to increased demands on small federal agencies.

We discussed with central agencies ways to address the risk areas within federal agencies and to increase their internal capacity. The proposed approaches include:

- developing a plan to provide federal agencies with muchneeded and adequate shared services;
- I providing a clear and systematic approach for portfolio Deputy Ministers to give the information, support and strategic direction needed by heads of agencies and Crown corporations:
- broadening and improving orientation for new appointees;
- establishing a roster of experts and/or "pathfinding" services to identify sources of advice on an ongoing and as-needed basis; and
- I providing debriefs on government priorities in a timely and effective manner and clarifying how federal agencies can contribute to their achievement.

We are confident that bringing together the Group of Heads of Federal Agencies and senior officials in central agencies was an important step in the right direction. The Group will now continue this work, which we all recognize is vital for strengthening our institutions and the public trust in them.

Systemic conditions or risks in the federal public sector

During the past year, in collaboration with APEX, the Canada School of the Public Service, and the National Joint Council of the Public Service of Canada, we consulted with executives and union leaders to identify systemic conditions that may give rise to wrongdoing. The intent of the consultations was also to propose ways to address these risks and to gather suggestions on how to promote a culture in which public servants can talk openly about their concerns and issues.

The discussions focused on two central themes:

- What systemic conditions or risks can we identify in the federal public sector that contribute to an environment where wrongdoing could occur?
- 2. What approaches and actions might improve these conditions and reduce these systemic risks?

Both the executive and union consultations revealed a strong belief in the necessity for clear leadership from central agencies in values and ethics, better human resources practices and a corporate culture that supports "right-doing". Participants noted the importance of ensuring that fundamental drivers of high-

performing, values-based organizations be developed and promoted. These include clear expectations regarding acceptable behaviours, exemplary ethical leadership, and a consistent and fair approach to performance assessment.

There was an emphasis on the importance of tackling the "small stuff". Public servants are often expected to deliver under pressure. with limited resources. As a result, in order to get the job done, they may sometimes cut corners or operate in a grey area where it is unclear what rules apply or where there are no rules. This is sometimes tolerated or even encouraged. Systemically, however, this can create considerable risk: small ethical infractions often evolve into larger ones that become more difficult to manage. A culture of tolerance for such behaviour can develop in which there is no clear distinction between right and wrong.

Key areas of vulnerability

Among the conditions raised by executives and unions, the following key areas of vulnerability emerged:

Clear communication - We need to clarify the definition of "wrongdoing" and "integrity" in the federal public sector by providing examples of behavioural expectations. In cases of inappropriate behaviour, it would be helpful to report what has been done to correct the situation while respecting the confidentiality of the persons involved. Likewise, cases of exemplary conduct should be

Both the executive and union consultations revealed a strong belief in the necessity for clear leadership from central agencies in values and ethics, better human resources practices and a corporate culture that supports "right-doing".

"Systemic tolerance of the grey zone can lead to systemic wrongdoing."

Tony Dean, former
Secretary of the Cabinet and Head of the Ontario Public Service

communicated for positive reinforcement.

Leadership - Senior executive leaders set the tone for an organization. Their active participation is crucial for promoting right-doing and open dialogue in the workplace. The rapid turnover of senior leaders has a significant impact on organizational culture.

In some cases, managers do not have sufficient confidence that their efforts to tackle wrongdoing will be supported at more senior levels. Unfortunately, responses to wrongdoing often involve further tightening of a "web of rules" or even the addition of new rules, which do not address the underlying issues.

Perceptions of how leaders respond to "exceptions to the rules" can play an important role in how employees behave. If employees perceive that others are getting away with bending the rules, they might question why they have to follow the procedures themselves.

Managing performance with integrity - Participants emphasized the correlation between sound and consistent human resources practices and a culture that discourages wrongdoing and promotes right-doing. There is a prevalent view that managers are not sufficiently trained, equipped or supported to assess and manage employee performance. In addition, performance agreements are often too vague and lack direct accountability for outcomes.

Recommended approaches and actions to improve systemic conditions and reduce risks

The suggestions to reduce systemic risks are summarized in the consultation reports on our website. The following areas are highlighted for particular attention and provide an idea of the types of approaches and actions that were recommended.

A stronger culture of integrity through strong leadership – Promoting a culture of integrity is impossible without consistent leadership and exemplary conduct at the top of the organization. Expectations must be clearly defined, and staff must be encouraged to freely express their concerns about integrity in their workplace.

Small things are important and must be dealt with quickly and effectively. Ignoring seemingly minor unethical conduct can lead to confusion, creating an environment that is conducive to wrongdoing. It is important to identify and tackle small incidents before they become larger or systemic. Front-line managers play a key role in this regard, and they need the support of senior leaders, whether addressing small incidents or serious wrongdoings.

A renewed focus on values and ethics by central agencies –
Promoting integrity in the public sector and establishing a culture that supports disclosure will not happen by itself. According to participants, there needs to be greater involvement by a central office with a strong

mandate and resources to drive sustainable change. The federal public sector must also adopt a new Values and Ethics Code and promote ethical conduct, right-doing and prevention.

The current emphasis on public service renewal offers an important platform for this renewed focus on values and ethics, which should be more visible as a government-wide priority. Expectations, rules and processes associated with building a culture of integrity should be reinforced. As well, efforts should be increased to foster an environment where disclosers can have a greater level of comfort. Training in values and ethics should be revised on an ongoing basis. A strategy, action plan and performance indicators should be established in support of this renewed focus on values and ethics.

Improved communication about the Public Servants Disclosure Protection Act – Efforts should be intensified to increase awareness of the Act, to explain and communicate the various elements of wrongdoing clearly and simply, providing specific examples wherever possible. Better communication is needed on the processes for internal and external disclosure of wrongdoing, with straightforward advice on how and where perceived wrongdoing should be reported.

The pressures faced by potential disclosers should be better recognized, and the protection offered by the *Act* against reprisals should be more clearly

communicated. There is also a need to report more clearly on actions taken in response to wrongdoing and highlight exemplary acts of right-doing and best practices.

Establishing baseline indicators

Indicators should be established to determine the level of understanding among employees of organizational values and integrity, against which progress can be measured. Public service tools and surveys should be adapted for this purpose, wherever possible.

The executive and union consultations demonstrated the importance of acting on the above recommendations to address vulnerabilities in the federal public sector.

Over the course of the next fiscal year, our Office will continue to have focused discussions with public service employees, managers, former and current disclosers and others on the systemic conditions in the public sector that could give rise to wrongdoing and on possible approaches to overcome these conditions

As the five-year review of our *Act* approaches in 2012, we want to provide Parliament with information to understand the unique aspects of the Canadian regime and experience.



Over the past decades, there has been a notable focus on public sector reform that reflects the need to enhance and maintain confidence in public institutions. In recent years, citizens' expectations of their governments have increased substantially, particularly in relation to greater transparency and accountability. In the context of such public scrutiny, governments have been motivated to modernize governance and administrative practices. Given that public trust is at stake, public sector reforms of late have been primarily driven by the development of ethics frameworks, codes of conduct and other values-based measures.

In Canada, the *Public Servants Disclosure Protection Act* was adopted in 2007. It was developed with the benefit of the experience of other countries that had already enacted disclosure legislation.

As the five-year review of our *Act* approaches in 2012, we want to provide Parliament with information to understand the unique aspects of the Canadian regime and experience. This way, Parliament will be well-equipped to evaluate the operation and administration of the *Act*.

Over the last year, we asked ourselves a number of questions to position Canada's disclosure regime more clearly in the international context: How is our regime different from that of other countries? What can we learn from our international counterparts? What do we have to offer them? What challenges do we share?

We consulted with our counterparts in the four countries we identified as being of particular value for comparison, based on their political systems, culture and public sector values: the United States, the United Kingdom, New Zealand and Australia. We met with public sector officials and representatives of nongovernmental organizations who are leaders in the field of disclosure, all of whom expressed a great interest in the Canadian experience.

We also worked with Canadian academics and researchers to build on this work and increase our understanding of international practices and approaches.

The Canadian regime: an integrated model

A comparison to the regimes of these four other countries serves to distinguish the Canadian approach to public sector disclosure. It also situates the *Act* as an important milestone in the continuing development of international regimes.

What makes the Canadian regime unique?

- 1. The Office of the Public Sector Integrity Commissioner is the only organization with a mandate to investigate disclosures of wrongdoing combined with the exclusive jurisdiction to investigate reprisals.
- 2. The *Act* creates a specialized Tribunal with the exclusive mandate to determine whether reprisals have taken place and to order disciplinary and remedial measures
- 3. The *Act* includes the development and adoption of a code of conduct for the federal public sector to be established by Treasury Board. In addition, every Chief Executive must establish an organizational code of conduct that is consistent with the Treasury Board's model. A serious breach of these codes would constitute a wrongdoing.

Similarities and shared challenges

 We share with our international counterparts the challenge of defining our roles and responsibilities in light of The Office of the Public Sector Integrity Commissioner is the only organization with a mandate to investigate disclosures of wrongdoing combined with the exclusive jurisdiction to investigate reprisals.

While Canada is still in the early stages of implementing the Act, we are already being recognized as a leader by other countries who are considering establishing their own disclosure regimes.

- overlapping jurisdictions with other oversight bodies and processes.
- I We are all concerned about developing appropriate benchmarks. Quantitative indicators are insufficient to measure the success of public sector disclosure regimes. An emphasis on prevention and cultural change is essential. The value of a disclosure regime is measured by how it protects the public interest and ultimately prevents wrongdoing from occurring in the public sector.
- Based on our shared experience, actual wrongdoing is the exception, not the norm.
- I We share the common challenge of reaching out to our stakeholders and clearly communicating our mandate and role so that they can make informed and confident decisions about disclosing wrongdoing.
- We all face the ongoing challenge of managing expectations regarding individual human resource issues that are not within our jurisdiction. These cases that deal with private interests can often be better addressed through other recourse mechanisms.
- I We share the belief that a pure enforcement model is insufficient. Prevention of wrongdoing is key. Most disclosure regimes include measures that encourage a culture of right-doing in the

public service. Disclosure regimes are closely linked to a broader values and ethics framework.

While Canada is still in the early stages of implementing the Act, we are already being recognized as a leader by other countries who are considering establishing their own disclosure regimes. This supports our ongoing goal of enhancing Canada's international leadership role as a model of transparency and good governance. This past year for example, we had the opportunity to share our experience and provide guidance to government representatives from Russia, China and Ukraine. These countries are exploring options to create disclosure regimes that are reflective of their own cultures and histories, while being inspired by our model.

Many challenges lie ahead in the coming year, but the public interest remains the driving force behind our activities.



Our first three years

It is only with time that the necessary operational infrastructure of a new institution can be put in place. At the end of our third year, our Office has developed internal policies and procedures required to support our activities. Many corporate documents have been finalized, including an organizational risk assessment, an outreach and prevention plan, and a strategic communications plan.

Advisory sub-committees (human resources, contracts and corporate services) serve as critical examiners and sounding boards. Our Audit Committee, which has been in place for more than a year, is currently developing a three-year audit and evaluation plan based on our corporate risk analysis.

It is important to be supported by professionals who have extensive experience and solid credibility. Their support also helps to build and solidify internal capacity.

At the beginning of the 2010-11 fiscal year, we will undertake a strategic planning exercise that will allow us to review our governance structure and revise our direction and priorities for the coming years.

We are continuing to refine our detailed procedures for administrative investigations to ensure we can respond effectively to new and increasingly complex cases. We have already begun this work by building on the procedures of our international counterparts and tapping into Canada's vast expertise in administrative investigations.

The skills and capacities of our small team are complemented by subject-matter experts whose services are retained as required to support our ongoing investigative work. For example, we have engaged the services of an expert in contract management to provide specialized advice and perspective on technical matters. It is important to be supported by professionals who have extensive experience and solid credibility. Their support also helps to build and solidify internal capacity. In addition, as our Office must ensure that it complies with the principles of natural justice, legal counsel participates in every case. We are confident that this approach is appropriate for our mandate and operations.

Five-year review of the Act

We are now entering our fourth year since the *Act* came into force. Four years is not a long time to evaluate

the administration of a new Act that covers the entire federal public sector, particularly given that we are a new institution and face the same challenges as other small federal agencies. It is also a short period of time in which to raise awareness of our Office throughout the public sector, to clarify our role and approach to our mandate, as well as to build a solid infrastructure.

During the coming year, we will take a critical look at the *Act* with a view to addressing the challenges we have experienced in its implementation and to develop recommendations in the context of the independent five-year review to be conducted by Treasury Board.

Practical workshops for Senior Officers and our provincial counterparts

In the fall of 2010, we will hold practical workshops for Senior Officers and our provincial counterparts, with a focus on best practices in administrative investigations. This will help build our collective capacity and continue to develop productive relationships with our stakeholders.

Machinery of government

In the coming year, we will also examine questions related to the machinery of government. What is the environment most conducive to the development and continuing strength of our Office as an Agent of Parliament within the larger context of the machinery of government? How

can we strategically position our institution for the future?

Crown corporations

In the last two years, we have received disclosures about Crown corporations that have been of particular concern to us. We have noted important deficiencies in some of these organizations. We discussed some of the sources of vulnerabilities within Crown corporations in our second Annual Report. We noted that good governance is key. In the coming year, we plan to conduct a more in-depth examination of the risks faced by Crown corporations and explore approaches to mitigating these risks.

Sound financial practices are essential but may not alone be sufficient to respond to the systemic risks these organizations face. Above all, chief executives and boards of directors who understand their roles and responsibilities are the cornerstones of Crown corporations. It is essential that they be given the necessary training to adequately carry out their duties, which include taking into account the commercial, public policy and social objectives of their organizations.

The importance of cultural change

Based on our ongoing media scans, discussions with our stakeholders and our outreach activities, we are increasingly concerned by the impression that public servants are not comfortable about expressing

their concerns freely and openly, and that they are afraid to criticize or question authority. It is generally recognized that such an environment does not support fundamental democratic principles.

The Preamble of the *Act* states that the federal public administration is part of the essential framework of Canadian parliamentary democracy. It also recognizes the importance of balancing the duty of loyalty to the employer with the freedom of expression guaranteed by the *Canadian Charter of Rights and Freedoms*.

We must create opportunities for dialogue where employees can freely raise concerns without fear of reprisal. They must feel confident that they will be heard, that action will be taken if necessary, and that they will be protected against reprisal. It is precisely these "safe spaces" for dialogue that will contribute to a stronger public sector.

Many challenges lie ahead in the coming year, but the public interest remains the driving force behind our activities. Our goal is to contribute to building and maintaining strong and honest public institutions in which we can all take pride.

In the last two years, we have received disclosures about Crown corporations that have been of particular concern to us.

As public servants, we must balance our right to freedom of expression with our duty of loyalty to our employer in order to serve the public interest.