



Office of the Auditor General of Canada
Bureau du vérificateur général du Canada

Report of the Auditor General of Canada under the *Public Servants Disclosure Protection Act*

Office of the Public Sector Integrity Commissioner of Canada

Case Reports 1 and 2

April 2014



OAG-BVG

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Auditor General of Canada
Vérificateur général du Canada

To the Honourable Speakers of the House of Commons and the Senate:

I have the honour to transmit herewith a report, which is to be laid before the House and the Senate in accordance with the provisions of subsection 38(3.3) of the *Public Servants Disclosure Protection Act*.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Michael Ferguson'.

Michael Ferguson, CPA, CA
FCA (New Brunswick)

OTTAWA, 11 April 2014

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CASE REPORT 1

**The Office of the Public Sector Integrity Commissioner
of Canada**

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Foreword

About PSIC

The Office of the Public Sector Integrity Commissioner of Canada (PSIC) is an independent organization created in 2007 under the *Public Servants Disclosure Protection Act* (PSDPA) to establish a safe and confidential way for public servants or members of the public to disclose wrongdoing in, or relating to, federal organizations.

Mandate of the Auditor General

When a disclosure of alleged wrongdoing concerns PSIC, the PSDPA gives the Auditor General the mandate to investigate.

The purpose of the investigations is to bring the findings of wrongdoing to the attention of the organization's chief executive and recommend corrective action.

Scope and context of this case

This report presents the findings of one such investigation as it relates to the disclosure of wrongdoing brought forward to the Auditor General.

We emphasize that this investigation concerns a single file among several hundred files handled by PSIC. This case report does not comment on the overall management of all files at PSIC, which was not investigated. Our findings relate solely to procedural matters. We found that the substantive decisions reached by the Commissioner were reasonable.

Further, this file was inherited by the current Public Sector Integrity Commissioner upon his appointment as Interim Commissioner in December 2010. Given the recent history of PSIC and the enormous transition within the organization while it was dealing with this file, we did not expect that 100 percent of its files would have been managed without error.

Overview

Disclosure to the Office of the Auditor General

1. On 11 January 2013, the complainant submitted a disclosure of alleged wrongdoing to the Auditor General concerning the Office of the Public Sector Integrity Commissioner (PSIC). On 1 February 2013, the Auditor General informed the Public Sector Integrity Commissioner (the Commissioner) that he was starting an investigation into the complainant's allegations against PSIC, including allegations that the Commissioner committed a wrongdoing under subsection 8(a) of the *Public Servants Disclosure Protection Act* (PSDPA) by contravening an Act of Parliament.
2. On 29 May 2013, following a review of PSIC documents and preliminary evidence that had been collected by the Office of the Auditor General, the Auditor General informed the Commissioner that the investigation would also examine whether the Commissioner and other PSIC officials had committed wrongdoings under subsection 8(c) (gross mismanagement in the public sector) and subsection 8(e) (serious breach of a code of conduct) of the PSDPA.

Period under investigation

3. The Auditor General's investigation focused on PSIC's management of the complainant's file from January 2011 to April 2013.

Complainant's initial contact with PSIC

4. In 2008, the complainant sent a disclosure of alleged wrongdoing under the PSDPA to PSIC and believed that a reprisal complaint had also been made to PSIC at that time. The complainant retired from the public service and mistakenly believed that the PSIC file would have to be closed.

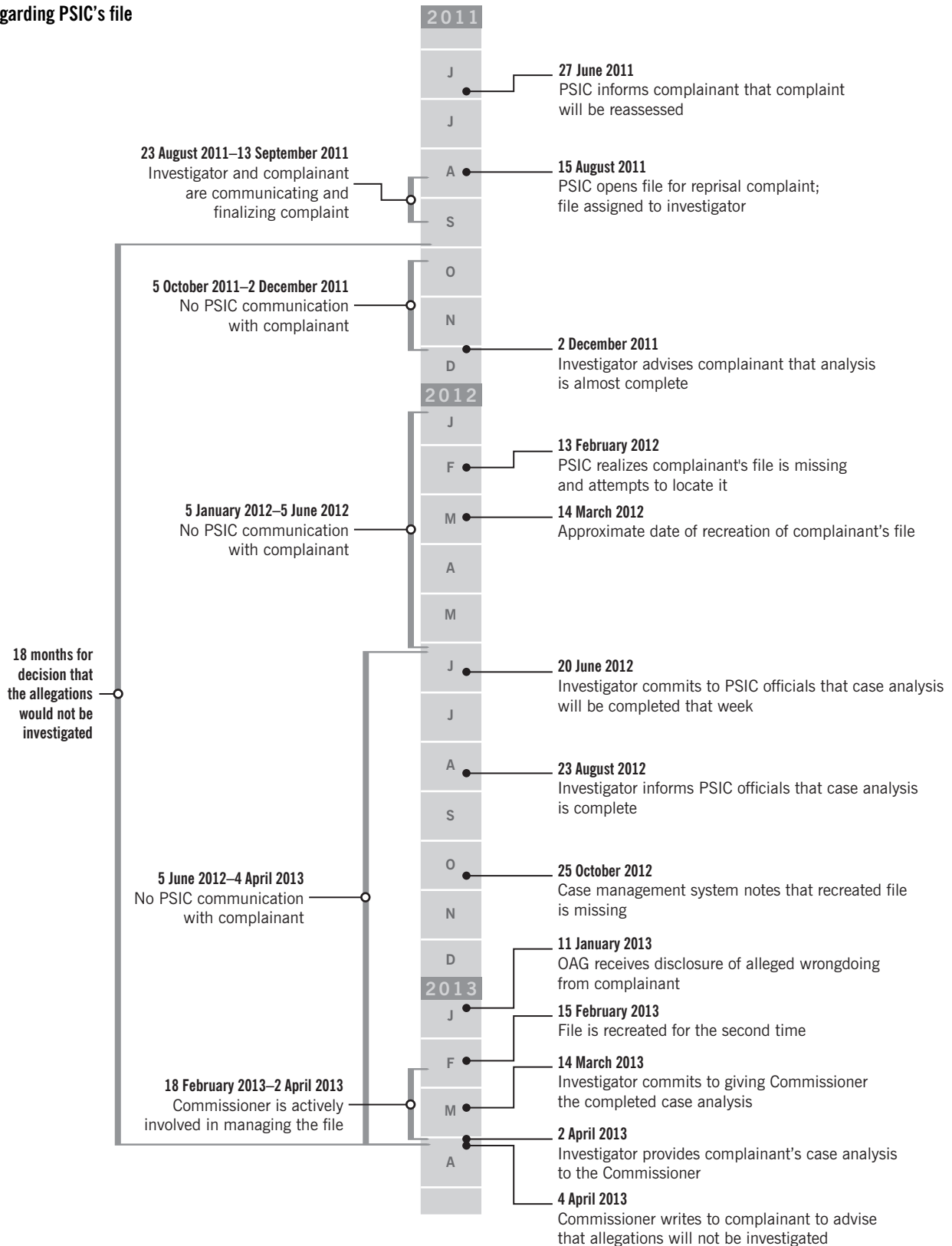
Deloitte review

5. In light of issues raised in the Auditor General's December 2010 report to Parliament on the Public Sector Integrity Commissioner, the new Interim Commissioner engaged Deloitte LLP to review all of PSIC's closed operational files. The complainant's file was flagged as having an irregularity because it was not clear to Deloitte that the complainant actually intended to close the PSIC file in 2008.
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Delays at PSIC

6. On 15 August 2011, the Commissioner opened a reprisal complaint file to reassess whether an investigation would be started into the reprisal allegations that the complainant believed were made in 2008.
 7. At various times in 2011, PSIC officials informed the complainant that the file was a priority and led the complainant to believe that a decision about whether PSIC would investigate would be made soon.
 8. The complainant sought updates from PSIC between January and June 2012. On 5 June 2012, the complainant exchanged email correspondence with the Commissioner and was informed that PSIC did not consider the file to be a priority, despite what the complainant had been previously told.
 9. There was no further communication between PSIC and the complainant until 4 April 2013, after the start of the Auditor General's investigation.
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Timeline of activities regarding PSIC's file



Findings

Wrongdoing under subsection 8 (a) of the *Public Servants Disclosure Protection Act*—Contravention of an Act of Parliament

The delay in deciding to deal with the reprisal complaint was unreasonable

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10. The Public Sector Integrity Commissioner's delay in processing the reprisal complaint file contravened subsection 19.4(1) of the *Public Servants Disclosure Protection Act* (PSDPA). Subsection 19.4(1) requires the Commissioner to decide whether he will deal with a reprisal complaint within 15 days of the complaint being filed. If the Commissioner decides to deal with a reprisal complaint, an investigation is opened. If not, the complainant is informed in writing that the file has been closed.
 11. On 27 June 2011, officials from the Office of the Public Sector Integrity Commissioner (PSIC) advised the complainant that the reprisal complaint would be reassessed based on the irregularity that had been identified by Deloitte LLP. The Commissioner opened a reprisal complaint file on 15 August 2011.
 12. The evidence shows that by 13 September 2011, the reprisal complaint had been formulated and finalized, and PSIC had confirmed receipt. This means that the 15-day deadline set by the PSDPA for PSIC to determine whether to start an investigation into the reprisal complaint expired on or about 28 September 2011.
 13. The Commissioner decided not to investigate the reprisal complaint and decided to close the file on 2 April 2013, more than 18 months after the deadline prescribed by subsection 19.4(1) of the PSDPA had expired. The Commissioner acknowledged that there was a delay and stated that the complainant's case was not extremely complex.
 14. Having reviewed the allegations and the conclusions reached in PSIC's assessment of the file, the Commissioner's decision to refuse to investigate the reprisal complaint was reasonable. However, the delay in reaching this decision was not reasonable.

PSIC failed to inform the complainant

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15. PSIC officials did not inform the complainant that the Commissioner decided the 15-day deadline would not apply to this reprisal file.
 16. According to the Commissioner, the 15-day limit set out in the PSDPA is not a service standard that Parliament intended to

establish under the Act but rather a period of suspension that does not count against other deadlines, so the complainant can preserve other avenues of recourse while a reprisal complaint is being considered by PSIC.

17. The Commissioner told us that, in his view, the 15-day deadline did not apply because the complainant had not formally made a reprisal complaint, and the usual reprisal complaint form was not submitted. The Commissioner acknowledged, however, that he did not require the complainant to submit a reprisal complaint form. The Commissioner stated that PSIC generated the reprisal file as part of a “complainant-driven approach” to deal with files flagged by Deloitte’s review.
18. PSIC managers, including the Commissioner, allowed the complainant to believe that PSIC was considering the reprisal complaint under the PSDPA. Statements made to the complainant created an expectation that the allegations would be treated as a reprisal complaint under the PSDPA, and that all requirements under the Act would be followed.

Wrongdoing under subsection 8 (c) of the *Public Servants Disclosure Protection Act*—Gross mismanagement

Definition

19. The *Public Servants Disclosure Protection Act* (PSDPA) does not provide a definition of “gross mismanagement.” In recent case reports that the Office of the Public Sector Integrity Commissioner (PSIC) has submitted to Parliament, the following factors were considered in investigations into allegations of gross mismanagement:
 - matters of significant importance;
 - serious errors that are not debatable among reasonable people;
 - more than *de minimis* wrongdoing or negligence (*de minimis* is a legal word for “trivial”);
 - management action or inaction that creates a substantial risk of significant adverse impact on the ability of an organization, office, or unit to carry out its mandate;
 - the deliberate nature of the wrongdoing; and
 - the systemic nature of the wrongdoing.

20. Overall, we consider these factors reasonable when determining whether gross mismanagement has occurred. All factors do not need to be present to reach a finding of gross mismanagement.

The lack of oversight by PSIC senior managers amounted to gross mismanagement

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21. We found that the actions and omissions of PSIC senior managers (the Commissioner and Deputy Commissioner) in relation to this file amount to gross mismanagement.
22. Given the 18-month delay in analyzing the reprisal complaint and the fact that PSIC senior managers failed on many occasions during that time to ensure that work was being conducted on the file, we found that there was more than *de minimis* wrongdoing or negligence in this case.
23. While the actions and omissions of PSIC senior managers were not the only reasons for the delay in analyzing the reprisal complaint, the lack of management supervision allowed the problem to continue. The case analysis was not completed until the Commissioner began to actively manage the progress of the file, which was not until February 2013. In our view, the inaction of PSIC senior managers to that point contributed to the Commissioner's inability to carry out his mandate in a timely manner in this case.
24. While PSIC senior managers may not have intended to ignore this file, mismanagement was systemic in relation to this file and was compounded by the confusion among managers regarding their responsibilities.
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Responsibilities of PSIC managers and investigators

Title	Responsibilities
Commissioner	<ul style="list-style-type: none"> • makes the final decision on all files* handled by the Office of the Public Sector Integrity Commissioner (PSIC) • is ultimately responsible for the actions and decisions of all PSIC employees
Deputy Commissioner	<ul style="list-style-type: none"> • reports directly to the Commissioner • supervises PSIC's Director of Operations • oversees PSIC's case analysis and investigation functions
Director of Operations	<ul style="list-style-type: none"> • reports directly to the Deputy Commissioner • supervises PSIC investigators • manages PSIC's investigation function
Investigator	<ul style="list-style-type: none"> • reports directly to the Director of Operations • processes PSIC's investigation files as assigned • performs case analysis as assigned by the Director of Operations or PSIC senior managers

*PSIC files include reprisals and disclosures of wrongdoing.

The responsibility for managing the reprisal file was unclear

25. Based on our interviews with PSIC managers, we determined that they had differing views about their responsibilities in managing this reprisal file. It is our view that much of the delay in this file could have been avoided by ensuring that all the PSIC managers understood and followed through on their responsibilities.
26. The Commissioner explained that he does not usually get involved in the direct management of individual files, but relies on PSIC managers to keep him informed of the progress of all files. The Commissioner also referred to management meetings during which every PSIC file is discussed. These meetings keep the Commissioner informed of the status of each file.
27. The Commissioner also stated that he would not intervene with an investigator who was not under his direct authority. According to the Commissioner, the Deputy Commissioner and Director of Operations were responsible for managing this reprisal file.
28. The acting Director of Operations—an employee seconded to PSIC from the federal organization named in the reprisal complaint—had verbally informed the Commissioner of a conflict of interest in relation to this reprisal file. The acting Director of Operations stated that the Deputy Commissioner had management responsibility for this file.

29. The Deputy Commissioner informed us that he believed he was in a conflict of interest situation with this file because of his earlier involvement with closed operational files that were reviewed by Deloitte in 2011, which included the complainant's closed file. The Deputy Commissioner informed us that as a result, in his view, the Commissioner had management responsibility for this file.
30. The confusion surrounding the responsibilities of PSIC senior managers for this file, and the failure by PSIC senior managers to manage its progress, contributed to significant periods of inactivity in the processing of the reprisal complaint. Although the Commissioner asked about the status of the file on a few occasions, he did not take any action until February 2013 to manage the delays that were occurring.
31. The Commissioner presented some reasons to explain why the reprisal file was not reassigned to another PSIC official. He explained that PSIC did not consider the file to be urgent or pressing because the complainant was not at risk of further harm or retaliation, and other active PSIC files were higher priorities. In our view, this was a matter of significant importance because this was an old file that had been identified by Deloitte as having an "irregularity."
32. In addition, the circumstances surrounding the opening of the reprisal file in 2011, and the promises made to the complainant by the Commissioner and other PSIC officials in response to the complainant's requests for updates, confirm that this file should have been managed as a priority for PSIC.

Expectations of complainants under PSDPA

33. People who make reprisal complaints to PSIC expect that they will be treated fairly and that their complaints will be given appropriate consideration. The PSDPA recognizes that reprisal complaints are matters of significant importance and contains a deadline for the Commissioner to decide whether he will investigate a reprisal complaint.
34. In this case, the lack of management activity and lack of follow-up on the complainant's reprisal file contributed to the delay in dealing with this matter and represent serious errors that are not debatable among reasonable people.

PSIC senior managers did not actively manage conflicts of interest

35. It should be noted that we did not see any formal PSIC procedures requiring employees to identify and document real or perceived threats to their ability to perform their duties in an objective and

impartial manner. With respect to this reprisal file, we did not see documentation that set out the nature and scope of the real or perceived conflicts of interest identified by the Deputy Commissioner or the acting Director of Operations.

36. We also did not see any evidence of mitigation measures that outlined the management accountabilities that needed to be put in place to ensure that the reprisal file would be monitored by other PSIC managers, since both the Deputy Commissioner and the acting Director of Operations believed they could not be involved in the direct management of this file.

Recommendation

37. PSIC should develop and implement a process to ensure that all its employees document real or perceived threats to their independence or objectivity in relation to specific operational files. PSIC should also put in place the safeguards to manage those threats, including the assignment of management responsibilities to other PSIC managers, where appropriate.

The loss of the reprisal file amounted to gross mismanagement

38. Although PSIC has procedures to manage the storage and control of operational files, the complainant's reprisal file was lost in February 2012 and recreated in March 2012. The PSIC investigator identified that this recreated file was lost in October 2012. The file was recreated again in February 2013. The Public Sector Integrity Commissioner confirmed that the complainant's original reprisal file and the first recreation of the file were never found.
39. The loss of the complainant's original file and the subsequent loss of the recreated file do not appear to have been deliberate. In our view, however, the fact that the lost files were not found increases the severity of the wrongdoing. We determined that the actions and inaction of the PSIC investigator and the Deputy Commissioner amounted to gross mismanagement.
40. In February 2012, while the PSIC investigator was on leave, PSIC managers determined that the complainant's reprisal file was missing. They attempted to locate the missing file but were unsuccessful.
41. The PSIC investigator was also unable to locate the original file and determined that it could be recreated from documents that were exchanged with the complainant in August and September 2011. The complainant's reprisal file was recreated by PSIC in March 2012.

42. The PSIC investigator identified that the complainant's recreated reprisal file was lost in October 2012, and informed the Deputy Commissioner. The Deputy Commissioner was the investigator's direct supervisor when the recreated file went missing. The investigator stated that the file was taken from a locked cabinet. The Deputy Commissioner's evidence was that he authorized the opening of the investigator's locked cabinet during the investigator's leave, but that the recreated reprisal file was not found when the cabinet was opened.
43. Although the PSIC investigator and the Deputy Commissioner were aware, in October 2012, that the recreated file had been lost, the file was not recreated again until 15 February 2013, four months after the investigator informed the Deputy Commissioner that the file was missing. The Deputy Commissioner did not take any steps to manage the recovery or recreation of the file.
44. In our view, this inaction contributed to the delay in completing the analysis of the reprisal complaint, as there is no evidence that the investigator performed any work on the file during that four-month period. This delay contributed significantly to the Commissioner's inability to make a timely decision in this case.
45. The loss of the original file, and the subsequent loss of the recreated file, is more than *de minimis* wrongdoing or negligence. Protecting the confidentiality and security of operational files is one of PSIC's core statutory responsibilities and a matter of significant importance. This is reflected in a number of specific duties and requirements in the PSDPA. The fact that the complainant's reprisal file was lost twice and never recovered is a serious error that is not debatable among reasonable people.

PSIC failed to inform the complainant

46. The complainant was never informed by PSIC that the file had been lost on two occasions, that the lost files were never recovered, and that the file had to be recreated in both instances.
47. We did not see any evidence that PSIC considered or followed a privacy breach protocol, or that it assessed whether it was necessary to notify the Privacy Commissioner that the complainant's personal information had been inadvertently lost.

The investigator's actions and omissions amounted to gross mismanagement

48. We found that the actions and omissions of the PSIC investigator in relation to the complainant's reprisal file amounted to gross mismanagement.

49. The reprisal complaint was assigned to the PSIC investigator on 15 August 2011 to assess whether an investigation should be started. The Commissioner stated that this investigator was solely responsible for completing the substantive work on the file. In September 2011, the investigator was actively involved in the file and was communicating with the complainant.
50. The complainant tried to contact the PSIC investigator on a few occasions in October and November 2011. The investigator did not respond to the complainant between 5 October 2011 and 2 December 2011.
51. On 2 December 2011, the PSIC investigator advised the complainant that the analysis of the reprisal complaint was almost complete. The complainant made a few attempts after that to contact the investigator. We determined that the investigator never communicated with the complainant after 2 December 2011. The investigator also made representations to PSIC officials that the analysis was almost complete in December 2011, but the investigator failed to provide it to PSIC managers for consideration.
52. The Commissioner explained that PSIC reassigned a number of the PSIC investigator's files, but that this reprisal file was not reassigned to another PSIC official, because the investigator had represented that the analysis was almost done.
53. The PSIC investigator continued to make representations to managers that the analysis was completed in June and August 2012. The investigator acknowledged that there was ample opportunity to submit the analysis. The investigator admitted that the analysis was not provided as promised due to competing priorities.
54. The PSIC investigator finally completed the analysis and submitted it to the Commissioner on 2 April 2013.
55. Given that PSIC had determined that it would treat the complainant's allegations as a reprisal complaint, the PSIC investigator's 18-month delay in completing the analysis is a matter of significant importance and constitutes a serious error that is not debatable among reasonable people. The investigator's inaction contributed significantly to the Commissioner's inability to make a timely decision in this case.

56. The PSIC investigator was responsible from August 2011 to April 2013 for producing an analysis on a priority basis, but the work was not completed in a timely manner. The management of the file by the investigator was reckless.
57. The mismanagement of the file by the PSIC investigator was more than *de minimis* wrongdoing. The delays in this file were extensive, and the PSIC investigator failed to satisfy the commitments made to the complainant or to PSIC managers.

Wrongdoing under subsection 8(e) of the *Public Servants Disclosure Protection Act*—Serious breach of a code of conduct

Definition

58. In recent case reports submitted to Parliament by the Office of the Public Sector Integrity Commissioner (PSIC), the following factors were considered in investigations into whether an action or omission is a “serious” breach of a code of conduct:
- the breach represents a significant departure from generally accepted practices within the federal public sector;
 - the impact or potential impact of the breach on the organization’s employees, clients, and the public trust is significant;
 - the alleged wrongdoer occupies a position that is of a high level of seniority or trust within the organization;
 - there are serious errors that are not debatable among reasonable people;
 - the breach of the code of conduct is systemic or endemic;
 - there is a repetitive nature to the breach(es) of the code of conduct or it has/they have occurred over a significant period of time; and
 - there is a significant degree of willfulness or recklessness related to the breach of the code of conduct.
59. Overall, we view these as reasonable factors to consider when determining whether a serious breach of a code of conduct has occurred. All factors do not need to be present to reach the finding that a serious breach of a code of conduct has occurred.

The PSIC investigator's actions amounted to a serious breach of a code of conduct

60. We found that the actions and omissions of the PSIC investigator amounted to a serious breach of the following requirements of the Values and Ethics Code for the Public Service:

2. Respect for People

Public servants shall respect human dignity and the value of every person by:

2.1 Treating every person with respect and fairness.

3. Integrity

Public servants shall serve the public interest by:

3.1 Acting at all times with integrity and in a manner that will bear the closest public scrutiny, an obligation that may not be fully satisfied by simply acting within the law.

61. We determined that the PSIC investigator did not treat the complainant or PSIC managers fairly or with respect in relation to the management of this reprisal file.

62. Further, the PSIC investigator did not act at all times with integrity and in a manner that would bear the closest public scrutiny. In particular, the investigator made clear, unambiguous, and unqualified representations to the complainant in August 2011, October 2011, and December 2011, and then failed to follow through. The investigator's statements to the complainant that the file was being handled on a priority basis created an expectation for the complainant. As a result, the complainant was expecting a timely resolution in this case.

63. The actions and omissions of the PSIC investigator represent a significant departure from generally accepted practices within the federal public sector and amount to serious errors that are not debatable among reasonable people.

The PSIC investigator's treatment of the file had a significant impact on both PSIC and the complainant

64. The PSIC investigator occupied a position of trust within PSIC, and the investigator's actions reflect directly on the organization. The investigator had primary responsibility both for the reprisal file and for communicating with the complainant.

65. The PSIC investigator willfully and recklessly represented that the file was a priority and failed to follow through on repeated representations to the complainant and on promises to PSIC managers that the file was being managed on a priority basis.

The investigator's representations in this file were repetitive in nature and occurred over a significant period of time.

66. The PSIC investigator did not complete the analysis of the file until 2 April 2013, 16 months after the investigator told the complainant that the analysis of the reprisal complaint was almost complete. The investigator did not contact the complainant after 2 December 2011 due to competing priorities.
67. The representations made by the PSIC investigator in 2011 had a considerable impact on the reputation of PSIC in this file. The Commissioner told us that he was not aware that the investigator had made representations to the complainant. The Commissioner told us that he became aware of the investigator's representations only when the complainant contacted him directly. The impact on both PSIC and the complainant is significant, as reflected in the complainant's statements that trust was lost in relation to PSIC's process.
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Conclusion

68. The Public Sector Integrity Commissioner decided not to investigate the complainant's reprisal file and decided to close it on 2 April 2013. As a result of internal delays, lack of management oversight, and related failures, the complainant had to wait for PSIC's decision for more than 18 months after the deadline prescribed by subsection 19.4(1) of the *Public Servants Disclosure Protection Act* (PSDPA) had expired. The impact on both PSIC and the complainant is significant, as reflected in the complainant's statements that trust was lost in relation to PSIC's process.
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69. On the basis of the information gathered during this investigation, we concluded that the Commissioner committed wrongdoings as defined in subsections 8(a) and (c) of the *Public Servants Disclosure Protection Act* by
- delaying the decision to deal with the reprisal complaint beyond the 15-day deadline prescribed by subsection 19.4(1) of the PSDPA,

- not ensuring that PSIC managers understood and followed through on their responsibilities with regard to the complainant’s file, and
 - not having a process in place to manage declared conflicts of interest.
70. On the basis of the information gathered during this investigation, we concluded that the Deputy Commissioner committed a wrongdoing as defined in subsection 8(c) of the *Public Servants Disclosure Protection Act* by
- grossly mismanaging the oversight of the complainant’s reprisal file and the investigator responsible for the file; and
 - failing to take any steps to manage the recovery or recreation of the complainant’s reprisal file after becoming aware, in October 2012, that the recreated reprisal file had been lost.
71. On the basis of the information gathered during this investigation, we concluded that the PSIC investigator committed wrongdoings as defined in subsections 8(c) and (e) of the *Public Servants Disclosure Protection Act* by
- delaying the completion of the analysis of the complainant’s file by more than 18 months;
 - failing to communicate with the complainant after 2 December 2011;
 - informing the complainant that the reprisal file was being handled on a priority basis and was almost complete, more than 16 months before the analysis was actually completed;
 - informing PSIC managers that the analysis on the file was almost complete in December 2011 and that it was completed in spring and summer 2012 when it was not completed until 2 April 2013; and
 - grossly mismanaging the storing, handling, and processing of the complainant’s reprisal file.
72. In accordance with section 22(h) of the PSDPA, we have made a recommendation to the Commissioner in paragraph 37 of this report.
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Comments from the Public Sector Integrity Commissioner

Although we agree with most of the report's factual findings, including the dates, assignments, the investigator's failings and broken promises as well as the lack of adequate procedures at the time, there are a number of objections we raised throughout the process that were not accepted and that might be useful in understanding this case report.

For example, the Office of the Public Sector Integrity Commissioner objected to the attempt to make it retroactively accountable for complying with the 15-day requirement set out in subsection 19.4(1) of the Act. This provision imposes a time limit on the process of determining whether or not to deal with a reprisal complaint. It should be understood that this report refers to a situation in which I decided to reopen a disclosure file that had been closed by my predecessor in order to help a former public servant who had, perhaps mistakenly, believed that resigning in 2008 had caused the automatic discontinuance of disclosure of wrongdoing the public servant made. I never applied the procedural requirements of the Act to this file as no reprisal complaint had ever been formally filed.

We would also like to highlight the fact that the Auditor General makes no mention in his report of the unexpected absences of the investigator assigned to the file, despite the fact that this information had been brought to the attention of the Office of the Auditor General (OAG). The unusual delay in analyzing the admissibility of the complaint was due in large part to the investigator's frequent and prolonged absences throughout the period in question.

As to the findings regarding the lost file, the only one among the hundreds created since the inception of the Office, there is no evidence pointing to any leak of unauthorized information from PSIC's offices, which are only accessible by PSIC employees.

Lastly, it is next to impossible for this isolated incident to reoccur. Even before the start of this investigation, the Office shared the same concerns about the length of time it took to process certain files and had completed a business process reengineering exercise in order to accelerate the analysis of cases without compromising quality and integrity in carrying out our duties under the Act. In addition, we have established clear service standards that have been subject to close monitoring by the first permanent Director of Operations, who was appointed in July 2013.

With regard to managing conflict of interest situations, the Office has now adopted the Office of the Public Sector Integrity Commissioner of Canada Policy on Conflict of Interest and Post-Employment, which was developed in consultation with PSIC's managers and employees and which reflects the unique nature of our work as an independent agent of Parliament.

The investigator who was criticized by the Auditor General had in fact left the Office during the OAG's investigation.

CASE REPORT 2

**The Office of the Public Sector Integrity Commissioner
of Canada**

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Foreword

About PSIC

The Office of the Public Sector Integrity Commissioner of Canada (PSIC) is an independent organization created in 2007 under the *Public Servants Disclosure Protection Act* (PSDPA) to establish a safe and confidential way for public servants or members of the public to disclose wrongdoing in, or relating to, federal organizations.

Mandate of the Auditor General

When a disclosure of alleged wrongdoing concerns PSIC, the PSDPA gives the Auditor General the mandate to investigate.

The purpose of these investigations is to bring the findings of wrongdoing to the attention of the organization's chief executive and recommend corrective action.

Scope and context of this case

This report presents the findings of one such investigation as it relates to the disclosure of wrongdoing brought forward to the Auditor General.

We emphasize that this investigation concerns a single file among several hundred files handled by PSIC. This case report does not comment on the overall management of all files at PSIC, which was not investigated. Our findings relate solely to procedural matters. We found that the substantive decisions reached by the Commissioner were reasonable.

Further, this file was inherited by the current Public Sector Integrity Commissioner upon his appointment as Interim Commissioner in December 2010. Given the recent history of PSIC and the enormous transition within the organization while it was dealing with this file, we did not expect that 100 percent of its files would have been managed without error.

Overview

Disclosure to the Office of the Auditor General

1. On 2 April 2013, the Office of the Auditor General (OAG) received a disclosure of alleged wrongdoing concerning the Office of the Public Sector Integrity Commissioner (PSIC) under the *Public Servants Disclosure Protection Act* (PSDPA). The disclosure was received from an individual (“the alleged wrongdoer”) who had been the subject of a PSIC investigation.
 2. On 8 May 2013, the Auditor General informed the Public Sector Integrity Commissioner (the Commissioner) that he was starting an investigation into the complainant’s allegations against PSIC, including that PSIC officials had committed wrongdoings under subsection 8(a) of the PSDPA (contravention of an Act of Parliament) and subsection 8(c) of the PSDPA (gross mismanagement).
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Period under investigation

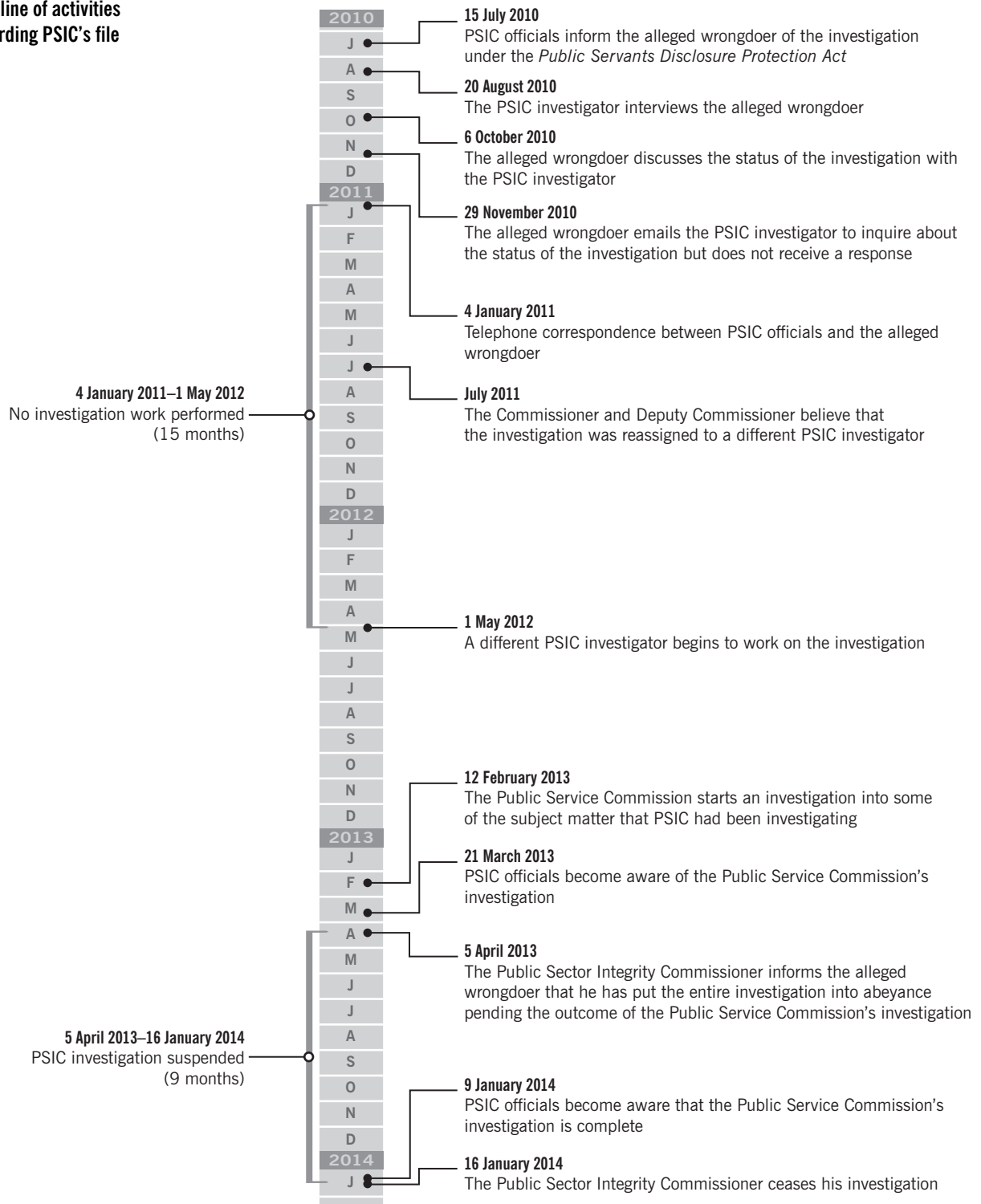
3. The Auditor General’s investigation focused on PSIC’s management of its investigation file from December 2009 to January 2014.
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PSIC’s investigation

4. In December 2009, PSIC received a disclosure of alleged wrongdoing under the PSDPA. In May 2010, PSIC started an investigation into these allegations.
5. The alleged wrongdoer was notified of PSIC’s investigation on 15 July 2010 and was interviewed by a PSIC investigator on 20 August 2010.
6. On 29 November 2010, the alleged wrongdoer emailed the PSIC investigator to ask about the status of the investigation. The alleged wrongdoer did not receive a response.
7. On 4 January 2011, the alleged wrongdoer spoke with PSIC officials. There was no further communication between PSIC and the alleged wrongdoer between 4 January 2011 and 26 September 2012. On 26 September, the alleged wrongdoer received a telephone call from a different PSIC investigator and was informed that a report that could contain an adverse finding would be sent.
8. From October 2012 to March 2013, the alleged wrongdoer and PSIC communicated frequently about the investigation and PSIC’s preliminary findings.

9. On 5 April 2013, PSIC informed the alleged wrongdoer that it had put the investigation into abeyance because the Public Service Commission had begun an investigation into the subject matter.
 10. On 16 January 2014, the OAG was informed that the Public Sector Integrity Commissioner had ceased his investigation.
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Timeline of activities regarding PSIC's file



Findings

Wrongdoing under subsection 8 (a) of the *Public Servants Disclosure Protection Act*—Contravention of an Act of Parliament

Contravention of subsection 26(2) of the PSDPA—PSIC’s investigation was not conducted as informally and expeditiously as possible

11. The Public Sector Integrity Commissioner’s (PSIC) investigation into the disclosure of alleged wrongdoing was ongoing for 44 months, with cumulative periods of inactivity exceeding 24 months. Overall, PSIC’s investigation was not conducted as informally and expeditiously as possible, which is a contravention of subsection 26(2) of the *Public Servants Disclosure Protection Act* (PSDPA).
12. We found that PSIC officials conducted the investigation as expeditiously as possible between December 2009 and 13 January 2011. During that period, PSIC analyzed the disclosure of alleged wrongdoing, the former Public Sector Integrity Commissioner decided to start an investigation, the PSIC investigator was assigned to the file, interviews were conducted, and a draft investigation report was produced.
13. The PSIC investigator’s term of employment ended on 31 December 2010. In early January 2011, there was some communication between PSIC officials and the alleged wrongdoer. PSIC senior officials informed us that the responsibility for the file was reassigned in July 2011; however, we determined that no investigation work was conducted at that time.
14. On 20 April 2012, responsibility for the file was formally reassigned to an investigator in PSIC’s electronic case management system. This PSIC investigator began to work on the file on 1 May 2012.
15. We determined that PSIC did not conduct any investigation work between 13 January 2011 and 1 May 2012 (more than 15 months). Given the delay caused by this period of inactivity, the investigation was not conducted as expeditiously as possible.
16. We found that from 1 May 2012 to 2 October 2012, the PSIC investigator was actively working on the file. This investigator produced a second draft investigation report that was approved by PSIC senior officials.

17. On 26 September 2012, the PSIC investigator contacted the alleged wrongdoer. The alleged wrongdoer was advised that a draft investigation report was forthcoming that may contain adverse findings. This was the first communication between PSIC officials and the alleged wrongdoer since January 2011.
 18. We found that from 2 October 2012 to 5 April 2013, PSIC officials were communicating frequently with the alleged wrongdoer and other affected individuals about the investigative process and the preliminary findings. PSIC officials were conducting the investigation as expeditiously as possible during this period.
 19. On 21 March 2013, PSIC was informed that the Public Service Commission had started an investigation into some of the subject matter that PSIC had been investigating. The Public Service Commission could not investigate the other part of the subject matter because it was outside its jurisdiction.
 20. On 5 April 2013, the Public Sector Integrity Commissioner decided to put PSIC's entire investigation into abeyance pending the outcome of the Public Service Commission's investigation.
 21. On 9 January 2014, the Public Service Commission provided PSIC with a report on its investigation. On 16 January 2014, PSIC informed the Office of the Auditor General that the Public Sector Integrity Commissioner had decided to cease his investigation.
 22. The Public Sector Integrity Commissioner's decision to put his investigation in abeyance, including the part that was not being investigated by the Public Service Commission, resulted in a period of inactivity of more than nine months (5 April 2013 to 16 January 2014).
 23. The Public Sector Integrity Commissioner informed us that this decision to put the investigation into abeyance was based on the public interest. We note that the PSDPA does not contain an express power to put investigations into abeyance when another person or body is dealing with the subject matter. However, paragraph 22(f) of the PSDPA allows the Commissioner to establish procedures for processing disclosures, and it can be implied that the Commissioner can make procedural decisions that pertain to investigations. In our opinion, there is a lack of clarity in the PSDPA regarding the Commissioner's authority to hold all or part of an investigation in abeyance for an indeterminate period.
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Contravention of paragraph 22(e) and section 44 of the PSDPA—PSIC failed to protect confidential information

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24. On 17 October 2012, the PSIC investigator sent a redacted copy of PSIC’s preliminary investigation report, and supporting documents, to the alleged wrongdoer. We found that in failing to properly redact some information that should have been protected, the investigator contravened paragraph 22(e) and section 44 of the PSDPA.
 25. Information such as the name of the individual who disclosed the alleged wrongdoing (the “discloser”) was redacted in the supporting documents. The redactions were performed with a marker, but the first name and gender of the discloser could still be seen through the marker. This allowed the alleged wrongdoer to identify the person who made the disclosure of alleged wrongdoing to PSIC.
 26. Paragraph 22(e) of the PSDPA requires PSIC to protect, to the extent possible in accordance with the law, the identity of persons involved in the disclosure process. PSIC, therefore, had an obligation to protect the identity of the person who disclosed the alleged wrongdoing.
 27. Section 44 of the PSDPA contains a similar confidentiality requirement. It states that unless the disclosure of information is required by law or permitted by the Act, PSIC officials should not disclose any information that comes to their knowledge in the performance of their duties under the PSDPA.
 28. Given that the investigator decided to redact certain information about the discloser in documents provided to the alleged wrongdoer, the failure to properly redact information that identified the discloser represents a contravention of paragraph 22(e) and section 44 of the PSDPA.
 29. In addition, on 10 December 2012, the investigator sent an email to their own personal email account outside PSIC’s secured environment. The email contained the alleged wrongdoer’s name and identified the alleged wrongdoer as being affected by a PSIC investigation.
 30. The failure to protect the alleged wrongdoer’s identity and information pertaining to the investigation represents a contravention of paragraph 22(e) of the PSDPA.
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Recommendation

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31. PSIC senior managers should ensure that all employees document their confirmation that they have read, understand, and agree to abide by, security and confidentiality requirements that apply to information gathered in investigations.
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Wrongdoing under subsection 8(c) of the *Public Servants Disclosure Protection Act*—Gross mismanagement**Definition**

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32. The *Public Servants Disclosure Protection Act* (PSDPA) does not provide a definition of “gross mismanagement.” In recent case reports that the Office of the Public Sector Integrity Commissioner (PSIC) has submitted to Parliament, the following factors were considered in investigations into allegations of gross mismanagement:
- matters of significant importance;
 - serious errors that are not debatable among reasonable people;
 - more than *de minimis* wrongdoing or negligence (*de minimis* is a legal word for “trivial”);
 - management action or inaction that creates a substantial risk of significant adverse impact on the ability of an organization, office, or unit to carry out its mandate;
 - the deliberate nature of the wrongdoing; and
 - the systemic nature of the wrongdoing.
33. Overall, we consider these factors reasonable when determining whether gross mismanagement has occurred. All factors do not need to be present to reach a finding of gross mismanagement.
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The lack of oversight by PSIC senior managers amounted to gross mismanagement

34. We found that the actions and omissions of PSIC senior managers (the Commissioner and Deputy Commissioner) regarding this file amount to gross mismanagement. While these actions and omissions were not the only reasons for the delay in PSIC’s investigation, the lack of management oversight allowed the problem to continue.
35. We found that the Commissioner and Deputy Commissioner knew that the investigation had been ongoing for a long time but failed to ensure that the investigation work was conducted and that the investigation was properly supervised between 13 January 2011

and 1 May 2012 (more than 15 months). Therefore, we found that there was more than *de minimis* wrongdoing or negligence in this case.

36. In our view, the inaction of PSIC senior managers contributed to the Commissioner's inability to carry out his mandate in a timely manner in this case. While PSIC senior managers may not have intended to ignore this file, the mismanagement of the file was systemic and was compounded by the confusion among managers regarding their responsibilities.
 37. The PSIC investigator who conducted the initial part of the investigation left the organization on 31 December 2010. The Deputy Commissioner informed us that he believed it was reassigned in July 2011. The new PSIC investigator did not believe that responsibility for the investigation had been formally reassigned. PSIC's electronic case management system did not show that the file was reassigned until 20 April 2012.
 38. The Deputy Commissioner informed us that it is the responsibility of investigators to ensure that PSIC's electronic case management system is updated. We note, however, that PSIC's *Intake, Inquiries & Investigations Manual* states that analysts, investigators and managers are responsible for updating the case management system regarding case activities and status.
 39. From May to November 2011, the Deputy Commissioner also performed the functions of the Director of Operations, and was, therefore, directly responsible for supervising the PSIC investigator. The Deputy Commissioner's failure to ensure that PSIC's case management system was properly updated to formally reassign responsibility for the investigation led to some confusion regarding responsibilities for this investigation in 2011.
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Responsibilities of PSIC managers and investigators

Title	Responsibilities
Commissioner	<ul style="list-style-type: none"> • makes the final decision on all files* handled by the Office of the Public Sector Integrity Commissioner (PSIC) • is ultimately responsible for the actions and decisions of all PSIC employees
Deputy Commissioner	<ul style="list-style-type: none"> • reports directly to the Commissioner • supervises PSIC's Director of Operations • oversees PSIC's case analysis and investigation functions
Director of Operations	<ul style="list-style-type: none"> • reports directly to the Deputy Commissioner • supervises PSIC investigators • manages PSIC's investigation function
Investigator	<ul style="list-style-type: none"> • reports directly to the Director of Operations • processes PSIC's investigation files as assigned • performs case analysis as assigned by the Director of Operations or PSIC senior managers

*PSIC files include reprisals and disclosures of wrongdoing.

40. Based on our interviews with PSIC managers, we determined that they had differing views about their responsibilities in managing this investigation. It is our view that much of the delay in this file could have been avoided by ensuring that all the PSIC managers understood and followed through on their responsibilities.
41. The Commissioner explained that he does not usually get involved in the direct management of individual files, but he relies on PSIC managers to keep him informed of the progress of all files. The Commissioner also referred to management meetings during which every PSIC file is discussed as a way to remain informed of the status of each file.
42. According to the Commissioner, the Deputy Commissioner and Director of Operations were responsible for managing this investigation file.
43. The acting Director of Operations was an employee seconded to PSIC in November 2011 from the federal organization named in the complaint that PSIC was investigating. The acting Director of Operations had informed the Commissioner of a direct conflict of interest in relation to this investigation. The acting Director of Operations stated that the Deputy Commissioner had management responsibility for this investigation file.

44. The Commissioner and the Deputy Commissioner stated that, due to the declared conflict of interest, the acting Director of Operations was not expected to manage the substantive aspects of the investigation. Despite the conflict of interest that had been declared, the Commissioner and Deputy Commissioner stated that they expected the acting Director of Operations to manage the procedural aspects of the investigation.
45. The acting Director of Operations stated that the Commissioner and the Deputy Commissioner failed to explain that responsibility for supervising the procedural aspects of the investigation remained with the acting Director of Operations. The acting Director of Operations informed us that such responsibility would have been inappropriate given the nature of the conflict of interest, and that if the Commissioner or the Deputy Commissioner had asked the acting Director of Operations to manage any aspect of the investigation, the acting Director of Operations would have objected.
46. In our view, the conflict of interest declared by the acting Director of Operations was significant, and the acting Director of Operations should not have had any responsibilities in relation to this investigation.
47. The confusion surrounding the responsibilities of PSIC managers for this file, and the failure by PSIC senior managers to manage its progress, contributed to significant periods of inactivity in the investigation.
48. In this case, the lack of management activity, and the lack of follow-up on the file, contributed to the delay in dealing with this matter, and represent serious errors that are not debatable among reasonable people.

PSIC senior managers did not actively manage declared conflicts of interest

49. It should be noted that we did not see any formal PSIC procedures requiring employees to identify and document real or perceived threats to their ability to perform their duties in an objective and impartial manner. With respect to this file, we did not see documentation that set out the nature and scope of the real or perceived conflict of interest identified by the acting Director of Operations.
50. We also did not see any evidence of mitigation measures outlining the management accountabilities that needed to be put in place to ensure that the investigation would be monitored by other PSIC managers.

Recommendations

51. PSIC should establish a process to ensure that all PSIC employees document real or perceived threats to their independence or objectivity in relation to specific operational files. PSIC should also put in place the safeguards to manage those threats, including the assignment of management responsibilities to other PSIC managers where appropriate.
 52. PSIC managers should regularly update the PSIC electronic case management system to document case activities and status.
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Conclusion

53. On the basis of the information gathered during this investigation, we concluded that the Public Sector Integrity Commissioner committed wrongdoings as defined in subsections 8(a) and (c) of the *Public Servants Disclosure Protection Act* (PSDPA) by
 - failing to ensure that the investigation was conducted as informally and expeditiously as possible, as required by subsection 26(2) of the PSDPA;
 - not ensuring that PSIC managers understood and followed through on their responsibilities with regard to the investigation file; and
 - not having a process in place to manage declared conflicts of interest.
54. On the basis of the information gathered during this investigation, we concluded that the Deputy Commissioner committed a wrongdoing as defined in subsection 8(c) of the PSDPA by grossly mismanaging the oversight of the investigation file.
55. On the basis of the information gathered during this investigation, we concluded that the PSIC investigator committed wrongdoings as defined in subsections 8(a) of the PSDPA by failing to properly protect information relating to the alleged wrongdoer and the identity of the individual who made the disclosure of alleged wrongdoing to PSIC, as required by paragraph 22(e) and section 44 of the PSDPA.

56. In accordance with paragraph 22(h) of the PSDPA, we have made recommendations to the Commissioner in paragraphs 31, 51, and 52 of this report.
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Comments from the Public Sector Integrity Commissioner

I accept certain factual conclusions contained in this report, specifically the timeline of the file and the lack of appropriate procedures in certain areas during the period in question. My Office takes timeliness of file processing seriously, and I have undertaken, since 2012, a number of operational measures to ensure that files are processed in a timely yet fair and thorough manner.

I would like to reiterate certain contextual facts that we feel are important to take into consideration when reading this report.

The events that unfolded on this file and the previous file reported by the Auditor General were symptomatic of an exceptional transition period following the December 2010 Report of the Auditor General. The Office was under-staffed, with numerous positions encumbered by acting assignments, with one staff member responsible for three different functions simultaneously. Half of the positions were vacant in December 2010, and by 2012 we had a full staff complement. In addition, as the file review process was being addressed, the Office experienced a sharp increase in disclosures of wrongdoing.

My priority at the time of my interim appointment was to address the review of all the files handled by the Office since its inception, stabilize the organization by staffing all vacancies with qualified personnel and engage the Office's key stakeholders. Further, in light of the sensitive mandate of the Office, a significant amount of time was dedicated to training new employees in order to ensure that our important function is delivered effectively.

As acknowledged in the comments by the Auditor General, it would not have been reasonable to expect that 100 percent of the files would be without error, given the recent history of the Office and the enormous transition within the organization over the time periods in which both of the files were active.

Before being informed of the investigations by the Auditor General, I launched a business process reengineering exercise in order to

improve our file management procedures and to establish performance standards to ensure that files are dealt with in a timely manner. We have also completed an organizational review to ensure that essential skills are more precisely identified and key positions are appropriately classified and resourced.

The performance standards were implemented internally on 1 April 2013. Barring exceptional circumstances, we commit to making decisions to investigate a disclosure of wrongdoing within 90 days of the discloser's first contact with the Office, and investigations will be completed within one year of being launched.

We fully agree with the recommendations made in paragraphs 31, 51, and 52 in the report.

Although several measures are already implemented, such as the adoption of the Office of the Public Sector Integrity Commissioner of Canada Policy on Conflict of Interest and Post-Employment as well as improvements to the file management procedures and the signing of a confidentiality agreement at the time of employment with the Office, we will undertake a review of their full scope in order to implement any additional measures to assist in addressing these recommendations in 2014–15.
