

Office of the Public Sector
Integrity Commissioner
of Canada




Commissariat à l'intégrité
du secteur public
du Canada

**Findings of the Office of the Public Sector
Integrity Commissioner in the
Matter of an Investigation
into a Disclosure of Wrongdoing**

Fisheries and Oceans Canada

**Case Report
June 2017**



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The Honourable George J. Furey, Q.C.
Speaker of the Senate
The Senate
Ottawa, Ontario K1A 0A4

Dear Mr. Speaker:

I have the honour of presenting you with the Office of the Public Sector Integrity Commissioner's Report of Findings in the Matter of an Investigation into a Disclosure of Wrongdoing at Fisheries and Oceans Canada, which is to be laid before the Senate in accordance with the provisions of subsection 38 (3.3) of the *Public Servants Disclosure Protection Act*.

The report contains the findings of wrongdoing; the recommendations made to the chief executive; my opinion as to whether the chief executive's response to the recommendations is satisfactory; and the chief executive's written comments.

Yours sincerely,

A handwritten signature in blue ink that reads "Friday". The signature is written in a cursive, flowing style.

Joe Friday
Public Sector Integrity Commissioner
OTTAWA, June 2017

The Honourable Geoff Regan, P.C., M.P.
Speaker of the House of Commons
House of Commons
Ottawa, Ontario K1A 0A6

Dear Mr. Speaker:

I have the honour of presenting you with the Office of the Public Sector Integrity Commissioner's Report of Findings in the Matter of an Investigation into a Disclosure of Wrongdoing at Fisheries and Oceans Canada, which is to be laid before the House of Commons in accordance with the provisions of subsection 38 (3.3) of the *Public Servants Disclosure Protection Act*.

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OTTAWA, June 2017

Table of Contents

Foreword.....	2
Mandate.....	3
The Disclosure.....	4
About the Organization	4
Background	4
Results of the Investigation	5
Overview of the Investigation.....	6
Summary of Findings.....	6
Conclusion.....	8
Commissioner’s Recommendations and Departmental Response	9

Foreword

This case report, which I have tabled in Parliament as provided for in the *Public Servants Disclosure Protection Act* (the Act) outlines wrongdoing committed at the Department of Fisheries and Oceans when vital information about harmful sound levels on program vessels was withheld from employees for a period of seven months.

Employers have an obligation to ensure a safe and healthy work environment and to notify employees of every known health or safety hazard in the workplace. In this case, not sharing and directing employees not to share information with their staff and colleagues about an issue that could affect something as important as someone's hearing is of serious concern. It is not in keeping with management's responsibilities and certainly does not demonstrate transparency, engagement, collaboration and respectful communication.

This case report can also serve as a caution that long-term goals of establishing national approaches within federal organizations cannot come at a cost to employees' health and safety.

Joe Friday, Public Sector Integrity Commissioner

Mandate

The Office of the Public Sector Integrity Commissioner of Canada contributes to strengthening accountability and increases oversight of government operations by providing:

- public servants and members of the public with an independent and confidential process for receiving and investigating disclosures of wrongdoing in, or relating to, the federal public sector, and by reporting founded cases to Parliament and making recommendations to chief executives on corrective measures; and
- public servants and former public servants with a mechanism for handling complaints of reprisal for the purpose of coming to a resolution including referring cases to the Public Servants Disclosure Protection Tribunal.

The Office is an independent organization created in 2007 to implement the *Public Servants Disclosure Protection Act* (the Act).

Section 8 of the Act, defines wrongdoing as:

- (a) a contravention of any Act of Parliament or of the legislature of a province, or of any regulations made under any such Act, other than a contravention of section 19 of this Act;
- (b) a misuse of public funds or a public asset;
- (c) a gross mismanagement in the public sector;
- (d) an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment, other than a danger that is inherent in the performance of the duties or functions of a public servant;
- (e) a serious breach of a code of conduct established under section 5 or 6; and
- (f) knowingly directing or counselling a person to commit a wrongdoing set out in any of paragraphs (a) to (e).

The purpose of investigations into disclosures is, according to the Act, to bring the existence of wrongdoing to the attention of the organization's chief executive and to make recommendations for corrective action.

The Act was created to provide a confidential whistleblowing mechanism in the federal public sector. The disclosure regime established under this Act is meant not only to identify wrongdoing when it occurs, and to take corrective action to ensure the wrongdoing stops, but also to act as a general deterrent throughout the federal public sector. This is why legislation requires that founded cases of wrongdoing be reported to Parliament. This is a powerful tool of transparency and public accountability.

The Disclosure

On June 17, 2015, my office received a disclosure of wrongdoing which contained allegations that wrongdoing was committed at the Department of Fisheries and Oceans Canada (DFO) by withholding, for a period of approximately seven months, the results of a Noise Assessment of DFO's program vessels used by employees of the Conservation & Protection Branch (C&P), Maritimes Region. The Noise Assessment identified vessels that generated excessive noise and the requirement for hearing protection for employees working on these vessels.

On September 14, 2015, after a detailed analysis of the information provided, an investigation was initiated to determine whether wrongdoing was committed, as defined at paragraphs 8(d) and 8(e) of the Act: an act or omission that creates a substantial and specific danger to the life, health and safety of persons, or to the environment; and a serious breach of a code of conduct.

About the Organization

As described on its website, "Fisheries and Oceans Canada has the lead federal role in managing Canada's fisheries and safeguarding its waters."

DFO is comprised of six regions, specifically: Newfoundland and Labrador, Quebec, Pacific, Central-Arctic, Gulf, and Maritimes - Scotia-Fundy (Maritimes Region).

The Maritimes Region is one of the largest and most diverse of the six regions. This region is host to lobster fishing which is an industry that operates year round. While Fishery Officers may make fewer trips on the water during the winter months, depending on weather and ocean conditions, the possibility nonetheless exists that they may conduct a water patrol at any time during the 12-month cycle of a year.

Information obtained during my Office's investigation indicates that DFO vessels are generally purchased from within a region and stay within that region throughout their life span. On the other hand, and as a condition of employment, Fishery Officers can be subject to transfers among the six regions at any point during their career. Therefore, Fishery Officers may be exposed to differing levels of vessel/motor noise in different regions.

Background

Following the receipt of two Workers Compensation Board (WCB) claims related to hearing loss by Fishery Officers in the Maritimes Region, an Occupational Health and Safety advisor in the region contacted the Director of Conservation and Protection (C&P) Branch to propose conducting a Noise Assessment of the Maritimes Region fleet in order to assist with the

processing of current and future WCB claims. As a result, DFO retained a private consulting company to complete a Noise Assessment of four of its Maritimes Region vessels:

- Samson 30' Jet—Cummings Diesel 430hp (Samson 30);
- Hurricane 733—2x150 Yamaha (Hurricane 733);
- 911Boat—Evinrude 2x225 (Rosborough 9.11); and
- Rosborough hard shell 150hp Diesel (Rosborough hard shell).

The final version of the Noise Assessment identified the existence of a noise hazard based on both the federal and provincial safety standards as well as internationally recognized standards. The C&P Branch of DFO, in the Maritimes Region, received the final Noise Assessment on November 5, 2013, which included a recommendation for employees to wear hearing protection.

However, it was not until June 16, 2014, that an Interim Directive was distributed to employees informing them of the noise hazard and instructing them to wear hearing protection.

Results of the Investigation

The investigation found that wrongdoing as defined under paragraphs 8(d) and 8(e) of the Act was committed when:

- **Ms. Jacinta Berthier, Director of the Conservation and Protection Branch (the Director) at the time, created a substantial and specific danger to the health and safety of DFO employees and committed a serious breach of the *Values and Ethics Code for the Public Sector* by:**
 - Withholding the results of a Noise Assessment of DFO Maritimes Region program vessels; and,
 - Waiting, for a period of seven months, to advise employees who were directly exposed to a noise hazard to wear hearing protection.
- **The Conservation and Protection Branches in the Maritimes Region and at the national level (NHQ) created a substantial and specific danger to the health and safety of DFO employees and committed a serious breach of the *Values and Ethics Code for the Public Sector* by:**
 - Failing to take appropriate and necessary action to respond to a clear and demonstrated health and safety issue.

Overview of the Investigation

The investigation was initiated on September 14, 2015 and was conducted by Nicole Hoszko (Sacharuk) from my Office. The evidence collected included records of emails, vessel logs, relevant files linked to the allegations, as well as witness testimony from 12 individuals. DFO and its personnel fully cooperated in the investigation.

In keeping with my obligations under the Act, I provided the Director and DFO's Deputy Minister with a copy of a preliminary investigation report, and gave them full and ample opportunity to respond to the allegations.

In making my findings I have given due consideration to all of the information received throughout the course of this investigation, including responses to the preliminary findings provided by both the Director and DFO's Deputy Minister.

Summary of Findings

Act or Omission that Creates a Substantial and Specific Danger to Health of Persons

In determining whether an "act or omission creates a substantial and specific danger to the life, health or safety of persons, or to the environment, other than a danger that is inherent in the performance of the duties or functions of a public servant" under paragraph 8(d) of the Act, the following is considered:

- This type of wrongdoing contemplates a serious situation whereby the qualifiers "substantial" and "specific" are a clear expression of Parliament's intention that less serious situations where the possibility of creating a danger was somewhat remote would not be qualified as "wrongdoing" under the Act.
- The definition of "danger" means an exposure or liability to injury, pain, harm, or loss.

Serious Breach of a Code of Conduct

In determining whether an action or omission constitutes a “serious” breach of a code of conduct under paragraph 8(e) of the Act, the following defining elements are taken into consideration:

- 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 high level of seniority or trust within the organization;
- There are serious errors which 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/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.

In evaluating this specific allegation, the investigator assessed the facts of this case against the values of “respect for people”, “integrity” and “stewardship” contained in the *Values and Ethics Code for the Public Sector*.

The Noise Assessment prepared by the private consulting company clearly identified the existence of a noise hazard on certain Maritimes Region program vessels. The information obtained during the course of this investigation demonstrates that a small number of select employees knew about the results of the Noise Assessment but were instructed by the Director not to share it as she wanted to address the results from a national perspective first, based on her belief that all DFO employees across Canada could potentially be affected.

The Noise Assessment was sent to National Headquarters (NHQ) by the C&P Branch, Maritimes Region, however, because they did not specifically request assistance from NHQ in developing a national directive in response to the Noise Assessment, NHQ believed that the Noise Assessment had been sent to them for information purposes only. As such, they did not take any measures to address the problem identified.

Although the Noise Assessment results were first received by the C&P Branch, Maritimes Region on October 14, 2013 and finalized on November 5, 2013, it was not until June 16, 2014 that an Interim Directive was issued and shared with employees. Seven months elapsed before employees were advised of the known noise hazard.

DFO knew that Fishery Officers were exposed to excessive noise levels that could cause hearing loss, yet affected employees were not informed of the danger, were not given any directions or guidance to mitigate the danger, nor issued hearing-protection equipment in a timely manner.

The investigation determined that approximately three months passed from the time when the Noise Assessment was received by the C&P Branch, Maritimes Region to when an Interim Directive was drafted and provided to the Director. It then took approximately another four months for the Director to authorize the release of the Interim Directive to Maritimes Region employees. During those four months, no meaningful action was taken to finalize the draft Interim Directive. It was only after a Fishery Officer learned of the existence of the Noise Assessment and requested a copy that the Interim Directive was finalized and sent to employees 13 days later.

Under the circumstances, it is evident that this delay was caused by a lack of clear and concise direction as well as a lack of appropriate and timely follow-up action by management.

Regardless of the Director's rationale for wanting to establish a national directive, her decision to withhold the Noise Assessment from Maritimes Region employees who were at risk from the noise hazard, was contrary to her obligations as a manager.

Advising employees of a health hazard and implementing a new policy to respond to that hazard are two very distinct actions. It is reasonable to expect that a new policy takes time. What is not reasonable is to continue exposing employees to a known health and safety hazard for seven months. This cannot be accepted as responsible behaviour, especially by individuals who occupy positions of a high level of trust within their organization.

In the end, employees of the Maritimes Region were advised of the health hazard in a short one-page email. They were advised to use ear protectors that were already available at DFO. The issuance of this Interim Directive could, and should have taken place immediately.

Conclusion

Health and safety must always be taken seriously, and employers must fulfill their duties to protect employees in the workplace.

This investigation determined that wrongdoing was committed at DFO as defined at paragraphs 8(d) and (e) of the Act. Withholding the results of the Noise Assessment and failing to inform employees of a demonstrated health and safety hazard created a substantial and specific danger to the health and safety of DFO Maritimes Region employees and also constituted a serious breach of the *Values and Ethics Code for the Public Sector*.

Commissioner's Recommendations and Departmental Response

In accordance with the Act, I have made recommendations to the Deputy Minister of DFO, Ms. Catherine Blewett, concerning measures to be taken to correct the wrongdoing. I am satisfied with Ms. Blewett's responses to the recommendations and with the measures taken to date to address the wrongdoing identified in this report. I will be following up on these recommendations and reporting the results in my Annual Report.

My recommendations and the responses follow.

It is recommended that DFO adopt a national approach to completing noise assessments on all existing and new vessels, informing employees of the results of those assessments in a timely manner and taking appropriate action, including ensuring that proper personal protective equipment is issued, if and when required.

DFO has adopted a national approach to completing noise assessments on all existing and new vessels that has been in place for approximately 5 years. Under this approach, the Canadian Coast Guard, which has the procurement responsibility for all vessels for DFO and itself, conducts decibel readings on new vessels during the sea-trial stage before the vessels are put into service. The results of this testing is communicated to all staff who sail on these platforms. For any existing vessels that entered into service prior to such testing by the CCG (i.e. five years ago), DFO undertakes to conduct decibel readings and will communicate the final results of this testing to all staff who sail on these platforms as these results become available. DFO commits to taking appropriate action, including making proper personal protective equipment available, to protect the hearing of its employees who may be exposed to noise levels above national guidelines during their service on the Department's platforms.

The Department is committed to ensuring that proper personal protective equipment is available to all employees who serve on vessels that have environments with high noise as identified through decibel testing. As evidence of this commitment, DFO has for decades issued two forms of ear protection to all fishery officers, a practise that is ongoing and will continue into the future. In addition, in 2016, the Department completed a review of all its national and regional task hazard analyses, and produced an updated set of Standard Operating Procedures (SOP) to ensure the occupational safety of fishery officers working in all environments and platforms. The SOP includes reminders to fishery officers to be vigilant about the safety requirements of their workspaces and to wear the appropriate personal protective equipment as identified on the National Approved Equipment List.

It is recommended that DFO take appropriate measures to ensure that the hearing of employees who may have been affected be properly tested and that those results are communicated and documented in a timely and complete manner.

The Department currently requires a hearing test for employees who serve aboard vessels. This testing is part of the regular medical examinations required by the Department to ensure that employees are healthy and able to safely conduct their duties aboard vessels. The medical examinations, which will identify hearing deficiencies that may be caused by a noisy work environment, are based on a schedule that is defined in the Public Service Occupational Health Program. The results of the hearing test are recorded by appropriate medical professionals and communicated to employees at the time of the test.

It is recommended that DFO consider the need for individual disciplinary and corrective measures, given the nature of the wrongdoing.

The Department accepts this recommendation and will ensure that a process is undertaken where the employee will be presented with the facts of this report and will have an opportunity to respond. Management will subsequently consider any and all aggravating and mitigating factors in this matter and will determine an appropriate quantum of discipline based on jurisprudence.

Managers will also consider any additional applicable administrative measures that could be required to ensure that the wrongdoing is not repeated.