

***THE PUBLIC INTEREST DISCLOSURE
(WHISTLEBLOWER PROTECTION) ACT***

**PROCEDURES TO MANAGE DISCLOSURES
FOR DESIGNATED OFFICERS**

A. GENERAL

1. Introduction

The Public Interest Disclosure (Whistleblower Protection) Act (the “Act”) provides a process for the disclosure of significant and serious wrongdoing and protection against reprisals for persons who make such disclosures.

Section 3 of the Act defines wrongdoing as follows:

- an act or omission that is an offence under an Act or regulation
- an act or omission that creates substantial and specific danger to life, health or safety of persons or the environment, but does not include dangers inherent to the employee’s job
- gross mismanagement, including of public funds or a public asset
- knowingly directing or counseling a person to commit any of the above

Under section 10 of the Act, an employee or officer of a government department, office or government body may make a disclosure to his or her supervisor, the department’s designated officer or to the Ombudsman.

These procedures are designed to manage the receipt and handling of disclosures within departments and are intended for the use of designated officers. Handling of disclosures includes the review of disclosures received as well as the subsequent investigation of a disclosure, if required.

Use of these procedures requires a familiarity with and an understanding of the Act, and should not be used without referring to the Act as appropriate.

2. Protecting confidentiality and the principles of procedural fairness and natural justice

The identity of the persons involved in the disclosure process, including employees who make a disclosure, witnesses and persons who are alleged to be responsible for a wrongdoing, must be protected.

If an investigation of a disclosure is required, the investigation must be conducted in accordance with the principles of procedural fairness and natural justice. For example, the alleged wrongdoer has a right to know the nature of the disclosure, to receive relevant information as required, and to be given an opportunity to respond to the disclosure. The investigator must ensure the confidentiality of the information collected and must protect the identity of the persons involved in the disclosure process, including the disclosing employee, any witnesses and the alleged wrongdoer, to the fullest extent possible.

Information that comes to a person's attention or knowledge through the performance of their duties under the Act must be protected and must not be disclosed except as required under this or another Act.

3. Advice on handling of a disclosure

If assistance is required with the interpretation of the Act or these procedures, the supervisor must seek advice from the designated officer. The designated officer may seek advice from Civil Legal Services or the Civil Service Commission, depending on the nature of the advice required.

Section 34 of the Act provides that the designated officer may arrange for legal advice to be provided to employees and others involved in any process or proceeding under the Act, if this legal advice is necessary in the designated officer's opinion to further the purposes of the Act. Please refer to the information sheet "Arranging for Legal Advice" for guidance in this regard. If outside counsel is to be engaged, this may only be arranged through Civil Legal Services.

4. **Responsibility to take action on the subject matter of a disclosure**

As a result of the receipt, review or investigation of a disclosure, a supervisor, designated officer or Deputy Minister (chief executive) may become aware of a situation that requires action by the department, regardless of the resolution of the disclosure. For example, a supervisor or designated officer may become aware of alleged wrongdoing in connection with a disclosure that has been withdrawn or may receive a disclosure that does not represent a wrongdoing. While the disclosure would not require further action under the Act, the subject matter of the disclosure may need to be addressed by the department. An example is a workplace safety and health matter that does not constitute a wrongdoing.

In such a situation, individuals must recognize that they may have a **responsibility to take appropriate action to address matters that come to their attention**. This responsibility may arise under another Act, regulation or policy, or may be the result of general management or public service responsibility. Supervisors may seek advice from the designated officer, as necessary, to assist in the recognition of such situations, and the determination of appropriate actions. A designated officer may seek this advice from sources such as the Deputy Minister, Human Resources, Labour Relations, the Civil Service Commission or Civil Legal Services.

5. **Cooperation with the Ombudsman**

Under section 10 of the Act, an employee or officer of a department may make a disclosure of alleged wrongdoing to the Ombudsman. In addition, under subsection 30(1) of the Act, a person who is not an employee (or officer) may provide information to the Ombudsman if he or she reasonably believes that a wrongdoing has been committed or is about to be committed. The handling of these situations by the Ombudsman will be guided by Part 3 or subsection 30(1) of the Act.

Alternatively, under section 13 of the Act, when an employee makes a disclosure to the Ombudsman, the Ombudsman may take steps to help resolve the matter within the department, rather than investigating the disclosure under Part 3.

All employees and officers of a department must cooperate fully with the Ombudsman in the handling of a disclosure or information under the Act.

6. **Offences and penalties under the Act**

It is an offence under the Act:

- To take a reprisal against an employee or direct that one be taken against an employee because the employee has, in good faith, sought advice about making a disclosure, made a disclosure or co-operated in an investigation under the Act - section 27
- For a private sector employer to take, or threaten to take, any measure that adversely affects a private sector employee's employment or working conditions (including disciplinary measures, demotion and termination), only for the reason that the employee has, in good faith, provided information to the Ombudsman about an alleged wrongdoing, or the employer believes the employee will do so - section 31
- For a person acting or purporting to act on behalf of government (or an office or government body) to terminate a contract, withhold a payment that is due and payable or refuse to enter into a subsequent contract, only because a person contracting with government (or office or government body) or a person employed by a party to the contract, has, in good faith, provided information to the Ombudsman about an alleged wrongdoing in or relating to the public service - section 32
- For any person to knowingly make a false or misleading statement, orally or in writing, to a supervisor, designated officer, Deputy Minister (chief executive) or the Ombudsman, or to a person acting on his or her behalf or under his or her direction, in seeking advice, making a disclosure or during an investigation - subsection 33(1)
- For any person to willfully obstruct a supervisor, designated officer, Deputy Minister (chief executive) or the Ombudsman, or a person acting on his or her behalf or under his or her direction, in the performance of a duty under the Act - subsection 33(2)
- For any person to destroy, falsify, conceal or to direct, counsel or cause the destruction, falsification or concealment of a document or thing, knowing that the document or thing is likely to be relevant to an investigation under the Act - subsection 33(3)

A person who contravenes any of the above provisions is guilty of an offence and is liable on summary conviction to a fine of up to \$10,000 - subsection 33(4)

A prosecution under the Act may be commenced not later than two (2) years after the day the alleged offence was committed - subsection 33(5)

7. **Protection from liability**

No action or proceeding may be brought against a supervisor, designated officer, or Deputy Minister (chief executive), or a person acting on his or her behalf or under his or her direction, for anything done or not done, or for any neglect in the performance (or intended performance) of a duty or in the exercise (or intended exercise) of a power under the Act, unless the person was acting in bad faith – section 35

B. PROCEDURES

1. General procedures for handling disclosures and disclosure files

- a) Under section 12 of the Act, disclosures must be received in writing and must include the following information, if known:
 - a description of the wrongdoing
 - the name of the person(s) alleged to have committed the wrongdoing or be about to commit the wrongdoing
 - the date of the wrongdoing
 - whether the wrongdoing has already been disclosed and a response received
- b) Upon receipt, each disclosure must be marked to show the date of receipt.
- c) Each disclosure must be maintained in a separate file.
- d) Disclosures and disclosure files must be kept and handled in paper form only. To maintain confidentiality, information received (including disclosures) by electronic mail must be printed and the electronic mail deleted. The electronic mail must not be forwarded or responded to using the “reply” option.
- e) Disclosure files must be treated as strictly confidential, maintained in a secure manner and location, and protected from unauthorized access.
- f) Care must be taken at all times to protect the identity of the disclosing employee, any witnesses, and the alleged wrongdoer.
- g) All written information obtained as a result of the receipt of the disclosure, review of the disclosure, or the investigation of the alleged wrongdoing must be included in the disclosure file. All pertinent information obtained verbally must be documented in writing in the disclosure file and dated and signed by the person receiving the information.
- h) Should the designated officer create an electronic or paper record (e.g. a log) to track disclosures and/or requests for advice under the Act, care must be taken to handle the record with due regard to confidentiality requirements and protection of identity under the Act. The record must be treated as strictly confidential, maintained in a secure manner and location, and protected from unauthorized access.

- i) A records schedule template has been developed in consultation with the Government Records Office for departmental use in the secure retention and disposal of closed disclosure files. Closed disclosure files and logs are to continue to be maintained on site, in a secure manner and location, and protected from unauthorized access, for a minimum of three (3) years. When disclosure files and logs are transferred to the Government Records Centre, the transfer must occur without delay and must be undertaken in a manner consistent with confidentiality requirements and protection of identity under the Act.
- j) Only the designated officer may have access to disclosure files and logs stored at the Government Records Centre. The designated officer must work with the department's records officer and the Government Records Office to ensure this requirement is implemented appropriately within the department.

2. Procedures for the receipt of a disclosure when the disclosure is made to a supervisor

- a) The supervisor must arrange to privately discuss the disclosure with the disclosing employee within ten (10) working days of receiving the disclosure.

The supervisor must determine how the disclosing employee wishes to receive communication about the disclosure and respect the wishes of the employee. All pertinent verbal communication must be documented by the supervisor in writing and kept in the disclosure file.

The supervisor must advise the disclosing employee that information related to the disclosure, including his or her identity, will be protected and kept confidential to the fullest extent possible, subject to any other Act and to the principles of procedural fairness and natural justice. The supervisor must advise the disclosing employee that he or she also has a responsibility to protect information related to the disclosure, including protecting the identity of persons involved in the disclosure process.

- b) The supervisor must advise the disclosing employee that further review and handling of the disclosure will be undertaken by or under the direction of the designated officer.
- c) Immediately following the discussion with the disclosing employee the supervisor must contact the designated officer regarding the disclosure. If the subject matter of the disclosure relates to a matter under the supervisor's responsibilities, the supervisor must discuss with the designated officer whether any action is to be taken by the supervisor regarding the matter. Any advice or direction given by the designated officer to the supervisor must be followed.
- d) The supervisor must also arrange with the designated officer how the disclosure file will be forwarded to the designated officer to ensure that it is sent in a secure and confidential manner. The supervisor must promptly forward the disclosure file in its entirety and any accompanying material (e.g., route slip, transmittal) as arranged, marked "private and confidential", to the designated officer. The supervisor must not keep a copy of the disclosure file or any of its contents.
- e) If the subject matter of the disclosure involves the designated officer, the supervisor must forward the disclosure file in its entirety to the Deputy Minister for review and handling. The disclosure file and any accompanying material (e.g., route slip, transmittal) must be marked "private and confidential" and forwarded in a confidential manner. The supervisor must not keep a copy of the disclosure file or any of its contents. The supervisor must advise the disclosing employee that further review and handling of the disclosure will be undertaken by or under the direction of the Deputy Minister.

- f) If, after submitting a disclosure, the disclosing employee wishes to withdraw the disclosure, the supervisor should request that the disclosing employee provide written direction to the supervisor to do so. The supervisor should advise the employee that a disclosure may be made to the Ombudsman if the employee wishes to do so.

Upon receipt of the written withdrawal notice, the supervisor must close the disclosure file and forward the closed file to the designated officer for statistical tracking purposes only, with instructions that the disclosure has been withdrawn. The file and any accompanying material or instructions must be marked “private and confidential”, and forwarded to the designated officer in a confidential manner. The supervisor must not keep a copy of the disclosure file or any of its contents.

In the event that a disclosure is withdrawn, and depending on the nature of the disclosure, the supervisor should discuss with the designated officer whether any further action is to be taken regarding the subject matter of the disclosure.

- g) The supervisor must not disclose receipt or withdrawal of a disclosure to anyone other than the designated officer, or in the event the disclosure relates to the designated officer to the Deputy Minister.

3. **Procedures for the receipt and review of a disclosure by the designated officer**

(Note: the procedures in this section also apply to the review and handling of a disclosure by the Deputy Minister acting as or instead of the designated officer.)

- a) Upon receipt of the disclosure or disclosure file, the designated officer must review the disclosure to ensure that:
 - the nature of the disclosure pertains to a matter within the department; and,
 - review of the disclosure does not represent a conflict for the department or the designated officer. (For example, reviewing a disclosure involving the Deputy Minister or Minister would represent a conflict for the designated officer.)
- b) If the disclosure pertains to a matter outside the department, the designated officer has the authority to refer the disclosure to the designated officer of the government department, office or government body, as appropriate, for review and handling. Prior to making the referral, the designated officer must provide notice of the referral to the disclosing employee and advise the employee that if he/she does not agree with the referral, the disclosing employee may withdraw the disclosure within ten (10) working days of notice. The designated officer must advise the disclosing employee that a disclosure may be made to the Ombudsman. If the disclosing employee does not withdraw the disclosure, the designated officer must refer the disclosure to the designated officer of the government department, office or government body, as appropriate, for review and handling.

(See Sample Templates for the Notice and Referral of Disclosure to Another Designated Officer) (Provide link)

- c) If the disclosure represents a conflict for the designated officer or the department, the designated officer has the authority to refer the disclosure to the Ombudsman. Prior to making the referral, the designated officer must provide notice of the referral to the disclosing employee and advise the employee that if he/she does not agree with the referral, the disclosing employee may withdraw the disclosure within ten (10) working days of notice. If the disclosing employee does not withdraw the disclosure, the designated officer must refer the disclosure to the Ombudsman.

(See Sample Templates for the Notice and Referral of Disclosure to the Manitoba Ombudsman) (Provide Link)

d) Unless the disclosure involves the Deputy Minister or Minister, upon receipt of a disclosure or disclosure file, the designated officer must notify the Deputy Minister that a disclosure has been received, and provide information to the Deputy Minister regarding the nature of the alleged wrongdoing. The designated officer must ensure that only as much information is provided as is necessary to convey the nature of the allegation, recognizing the Deputy Minister's responsibility for the administration of the department.

e) If the disclosure has been made directly to the designated officer, he or she must arrange to privately discuss the disclosure with the disclosing employee within ten (10) working days of receiving the disclosure.

The designated officer must determine how the disclosing employee wishes to receive communication about the disclosure and respect the wishes of the employee. All pertinent verbal communication must be documented in writing, signed and dated by the designated officer, and kept in the disclosure file.

The designated officer must advise the disclosing employee that information related to the disclosure, including his or her identity, will be protected and kept confidential to the fullest extent possible subject to any other Act and to the principles of procedural fairness and natural justice. The designated officer must advise the disclosing employee that he or she also has a responsibility to protect information related to the disclosure, including protecting the identity of persons involved in the disclosure process.

f) If, after submitting a disclosure, the disclosing employee wishes to withdraw the disclosure, the designated officer must request that the disclosing employee provide written direction to the designated officer to do so. The designated officer must advise the employee that a disclosure may be made to the Ombudsman if the employee wishes to do so. Upon receipt of the withdrawal notice, the designated officer must close the disclosure file.

g) In the event that a disclosure is withdrawn, the designated officer must determine whether any action regarding the subject matter of the disclosure needs to be taken. This action is independent of the disclosure process, and is to be determined on a case-by-case basis, depending on the nature of the disclosure. The designated officer may need the advice of the Deputy Minister, and/or legal advice from Civil Legal Services.

- h) The designated officer must determine if the disclosure was made in good faith (section 2); falls within the categories of wrongdoing covered by the Act (section 3), keeping in mind the purpose of the Act (section 1); and, if the employee had a reasonable belief that the information could show that a wrongdoing has been committed or is about to be committed. Disclosures that don't meet these criteria do not require further action under the Act; however, the designated officer must determine whether any other action regarding the subject matter of the disclosure may need to be taken.
- i) A disclosure must be reviewed promptly to determine if the matter disclosed represents a wrongdoing as defined in the Act and to determine the appropriate action to be taken, if any. Every effort should be made to complete the review within thirty (30) working days from the initial receipt of the disclosure.
- j) If in the designated officer's opinion an investigation is not warranted, the reason for this determination, and any action(s) that has been taken or that will be taken, is to be documented in writing in the file. The disclosing employee and the Deputy Minister should be advised promptly that review of the disclosure has been concluded.
- k) If in the designated officer's opinion an investigation is warranted with regard to the disclosure, the designated officer must promptly advise the Deputy Minister. The disclosing employee may, where appropriate, be advised on a confidential basis that an investigation will be undertaken.
- l) If outside legal advice is to be arranged for any person involved in a disclosure, care must be taken to handle all correspondence to or from legal counsel, including billings for these services, with due regard to confidentiality requirements and protection of identity under the Act. Civil Legal Services must be involved in retaining outside legal counsel.

4. Procedures for investigation of the disclosure – designated officer

(Note: the procedures in this section also apply to the investigation of a disclosure by the Deputy Minister acting as or instead of the designated officer.)

- a) Investigations must be managed by the designated officer, with appropriate assistance, depending on the nature of the disclosure. This responsibility cannot be delegated.
- b) Managing the investigation may involve engaging specialized assistance (e.g., Internal Audit; Labour Relations) or referral to an appropriate agency (e.g., law enforcement) to conduct the investigation.
- c) Investigations must be conducted promptly and in a confidential manner, with due regard for the protection of the identity of persons involved in the disclosure process. All persons involved with the investigation must be cautioned not to disclose any information related to the investigation or the disclosure except as required by law or in accordance with the principles of procedural fairness and natural justice.
- d) Investigations must be conducted in accordance with the principles of procedural fairness and natural justice. For example, the alleged wrongdoer has the right to know the nature of the disclosure, receive relevant information as required, and to be given an opportunity to reply to the disclosure. The investigator must ensure the confidentiality of the information collected and must protect the identity of the disclosing employee, any witnesses and the alleged wrongdoer, to the fullest extent possible.
- e) Documentation of the outcome of the investigation must be included in the disclosure file. If the investigation results in a finding of wrongdoing, the disclosure file must include any recommendations or corrective actions to be taken in relation to the wrongdoing, or the reasons why no corrective action is being taken.
- f) The disclosing employee, the alleged wrongdoer and the Deputy Minister must be advised of the outcome of the investigation within sixty (60) working days of completing the investigation, unless there are extenuating circumstances. The designated officer must include a note in the disclosure file, signed and dated, confirming that appropriate communication has occurred.
- g) If outside specialized expertise is retained by the designated officer to assist in the investigation (e.g., outside legal advice, specialized investigators, forensic auditors), care must be taken to handle all correspondence to or from any expert, including billings for these services, with due regard to confidentiality requirements and protection of identity under the Act.

5. **Procedures when a disclosure is made to the public**

Under subsection 14(1) of the Act, an employee may make a disclosure to the public if he or she believes that the matter constitutes an imminent risk and specific danger to the life, health, or safety of persons or to the environment, such that there is insufficient time to make the disclosure under section 10.

The employee must first make the disclosure to an appropriate law enforcement agency, or in a health-related matter, to the chief medical officer of health. Disclosure to the public is subject to any direction the agency or officer considers necessary in the public interest. Immediately after making a disclosure to the public under subsection 14(1) of the Act, the disclosing employee must also make a disclosure about the matter to his or her supervisor or the designated officer.

Receipt of a disclosure under subsection 14(1) constitutes a disclosure under the Act similar to a disclosure made under section 10. Accordingly, many of the foregoing procedures apply, as follows:

- a) Upon receipt of the disclosure, the supervisor or designated officer must follow the procedures set out in B-1, “General procedures for handling disclosures and disclosure files”.
- b) **The procedures set out in B-2, “Procedures for the receipt of a disclosure when the disclosure is made to a supervisor” do not apply.** If the disclosure is received by a supervisor, the supervisor must immediately forward the disclosure file in its entirety to the designated officer. The disclosure file and any accompanying material (e.g., route slip, transmittal) must be marked “private and confidential” and forwarded to the designated officer in a confidential manner. The supervisor must not keep a copy of the disclosure file or any of its contents.
- c) Immediately upon receipt of a disclosure or disclosure file, the designated officer must notify the Deputy Minister that a public disclosure has been received and provide information to the Deputy Minister regarding the nature of the alleged wrongdoing such that determination of appropriate action may be made.
- d) The procedures set out in B-3, “Procedures for the receipt and review of a disclosure by the designated officer” and B-4, “Procedures for the investigation of the disclosure – designated officer” apply, as appropriate.

C. ANNUAL REPORTING OF DISCLOSURES – DESIGNATED OFFICER

The designated officer must ensure there is a mechanism in place to track disclosures of alleged wrongdoing that have been made to a supervisor or the designated officer, including those initially made to the public under subsection 14(1) of the Act, for annual reporting purposes. The report must be included in the department's Annual Report.

Under subsection 18(2) of the Act, the department's Annual Report must include the following information:

- the number of disclosures received

All disclosures made to a supervisor or the designated officer under section 10 or subsection 14(1), which have been made in good faith under the Act and in accordance with the requirements under section 12, must be counted as a disclosure received. This includes disclosures that may have been withdrawn as well as those initially made to the public.

- the number of disclosures acted on or not acted on

The designated officer must determine if the disclosure was made in good faith (section 2); falls within the categories of wrongdoing covered by the Act (section 3), keeping in mind the purpose of the Act (section 1); and if the employee had a reasonable belief that the information could show that a wrongdoing has been committed, or is about to be committed. Based on this determination, the designated officer must categorize the disclosures as those acted upon and not acted upon. Disclosures not acted upon will include those disclosures that do not meet the foregoing considerations, and those that have been withdrawn.

- the number of investigations commenced as a result of a disclosure
- if an investigation results in a finding of wrongdoing, a description of the wrongdoing and any recommendations or corrective actions taken, or the reasons why no corrective action was taken