

October 2016

The Public Interest Disclosure (Whistleblower Protection) Act

ARRANGING FOR LEGAL ADVICE

The Public Interest Disclosure (Whistleblower Protection) Act facilitates disclosure and investigation of serious wrongdoing in or related to the public service and protects persons who make disclosures from reprisal. The Act applies to government departments, "government bodies" and "offices"¹. Government bodies include government agencies as defined in *The Financial Administration Act*, Regional Health Authorities, Child and Family Services Agencies, Child and Family Services Authorities, and other bodies designated as government bodies by regulation.

Under the Act:

- Deputy Ministers of departments and the chief executive officers of government bodies must designate a senior official to be the Designated Officer for the purposes of the Act, to receive and deal with disclosures by employees in the Department or government body.
- An employee may make a disclosure of wrongdoing to:
 - (a) The employee's supervisor;
 - (b) The employee's Designated Officer; or
 - (c) The Ombudsman.
- Subject to any regulations, Designated Officers may arrange for legal advice to be provided to employees and others involved in any process or proceeding under the Act, if necessary (section 34).

This policy is intended to provide guidance to Designated Officers who receive and deal with disclosures by employees.

Persons who may require legal advice include:

- Designated Officers;
- Employees who make disclosures; and
- Others involved in any process or proceeding under the Act, such as persons who are the subject of disclosures; persons who are associated with the subject matter of the disclosure (for example, potential witnesses).

The Department of Justice is charged with the responsibility of providing legal services to the government. The Department of Justice provides services of the nature contemplated under the

¹ The "offices" the Act applies to are the offices of the Auditor General, the Chief Electoral Officer, the Children's Advocate, the registrar appointed under *The Lobbyists Registration Act*, Information and Privacy Adjudicator and the Ombudsman.

Act through Legal Services Branch (LSB). The General Manual of Administration provides that outside counsel may only be retained where the Department of Justice, through its own counsel, is unable to provide legal services required by a client department or agency.

Advice to Designated Officers

Designated Officers may require legal advice respecting their responsibilities under the Act and in respect of disclosures received. LSB counsel may be able to provide general advice of a procedural nature to Designated Officers in these circumstances.

Where a Designated Officer requires such legal advice:

1. The Designated Officer should contact the Director of LSB, Telephone No. (204) 945-0110 to discuss the services required.
2. Counsel within LSB will be assigned to assist in the matter and the client department is responsible for payment of LSB fees and disbursements.
3. In order to respect the confidentiality of information and to protect the identity of persons involved in the disclosure process, accounts submitted by LSB will be directed to the Designated Officer and must be approved by the Designated Officer on behalf of the client department.
4. If LSB counsel cannot assist in the matter, then outside counsel will be retained in accordance with the procedures set out below.

Arranging for advice for employees and others

It is anticipated that LSB counsel will not be in a position to provide legal advice to employees who make disclosures, to persons who are the subject of the disclosures or to persons who are associated with the subject matter (for example, potential witnesses) because the nature of such matters is likely to create a conflict of interest for government legal counsel. In these situations, it will therefore be necessary to retain outside counsel and the client department or agency is responsible for payment of the fees and disbursements of the counsel.

Where a Designated Officer is of the opinion it is necessary to arrange for legal advice to be provided under the Act:

1. The Designated Officer should contact the Director of LSB, Telephone No. (204)945-0110 to discuss the services required. These arrangements can be made very quickly, especially in an emergency situation.
2. The Director of LSB is responsible (in consultation with the Designated Officer) for selecting the suitable outside counsel, negotiation of counsel's remuneration, and the scope of the terms of the retainer.
3. The government's rates for outside counsel are:

- Up to \$285.00 per hour for senior counsel with 20 or more years at the bar, retained in rare circumstances where counsel meets many, if not most of certain specified criteria.² Discussions with the Director of LSB are recommended;
 - \$210.00 per hour for counsel with 10 or more years at the bar;
 - \$160.00 per hour for counsel with 5 – 9 years at the bar;
 - \$120.00 per hour for counsel with 1 – 4 years at the bar; and
 - \$65.00 per hour for articling students.
4. Outside counsel is formally retained by way of a letter of retainer from the Deputy Minister of Justice. The Designated Officer will be informed that the retainer letter has been issued.
 5. In order to respect the confidentiality of information and to protect the identity of persons involved in the disclosure process, accounts submitted by outside counsel will be directed to the Designated Officer and must be approved by the Designated Officer on behalf of the client department. The accounts must also be approved by the Director of LSB to ensure that the terms of the retainer have been complied with prior to payment.
 6. Please note that government employees may be entitled to the protection of the civil liability provisions contained in the applicable collective agreement or those contained in *The Conditions of Employment Regulation* under *The Civil Service Act*. Questions about the applicability of these provisions should be referred in the first instance to Rick Stevenson, Assistant Deputy Minister, Labour Relations Division, Civil Service Commission, Telephone No. (204) 945-2136.

If you have any questions on this policy, please contact the Director of LSB directly.

² The criteria are:

- (a) extensive experience in the field of law under consideration (eg. Civil litigation, criminal litigation, etc.);
- (b) being lead counsel on a complex matter;
- (c) counsel should be seen as one of the leading members of the bar in the area under consideration;
- (d) in some cases, counsel may be able to offer an expertise which is rare and difficult to find in Manitoba;
- (e) in some situations, it may be important to retain a particular and specific lawyer to demonstrate that resulting advice carries absolute integrity and independence;
- (f) in some cases, there may be a public expectation that a specific lawyer will be retained to handle a case, and the lawyer involved insists on a fee which is higher than the general maximum rate of \$210.00 per hour.