

Office of the Public Sector
Integrity Commissioner
of Canada



Commissariat à l'intégrité
du secteur public
du Canada

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

Canada School of Public Service

Case Report
November 2013

The generic masculine has been used in this report to protect the identity of those concerned.

The Report is available on our Web site at: www.psic-ispcc.gc.ca

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The Honourable Noël A. Kinsella
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 the Canada School of Public Service, 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 recommendation made to the chief executive; my opinion as to whether the chief executive's response to the recommendation is satisfactory; and the chief executive's written comments.

Yours sincerely,

A handwritten signature in black ink that reads "Mario Dion". The signature is written in a cursive, flowing style.

Mario Dion
Public Sector Integrity Commissioner
OTTAWA, November 2013

The Honourable Andrew Scheer, 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 the Canada School of Public Service, 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*.

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

Yours sincerely,

A handwritten signature in black ink that reads "Mario Dion". The signature is written in a cursive, flowing style.

Mario Dion
Public Sector Integrity Commissioner
OTTAWA, November 2013

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Foreword

I present you with this case report of founded wrongdoing, which I have tabled in Parliament as required by the *Public Servants Disclosure Protection Act* (the *Act* or PSDPA).

The *Act* was created to provide a confidential whistleblowing mechanism in the federal public sector to respond to the need to address and prevent cases of wrongdoing. The disclosure regime established under the *Act* is meant not only to stop these actions from continuing and to signal the need for corrective action, but also to act as a general deterrent throughout the federal public sector. This is the reason why founded cases of wrongdoing are required by the *Act* to be reported to Parliament, which is a powerful tool of transparency and public accountability.

The findings made in this report demonstrate the importance for all public servants to understand, at all times, the privacy and confidentiality protection requirements of the various statutes that govern the federal public sector. This finding demonstrates that even with good intentions, one's actions can inadvertently constitute an act of wrongdoing.

I believe this finding also serves as a strong reminder that all public servants who are involved in disclosures, including those who make a protected disclosure of wrongdoing and officials who manage these disclosures, must act responsibly in protecting sensitive information. They must also follow established procedures or practices for the secure handling, storage, transportation and transmission of information that the Government of Canada or any portion of the public sector is taking measures to protect.

Mario Dion, Public Sector Integrity Commissioner

Mandate

The Office of the Public Sector Integrity Commissioner of Canada is an independent organization created in 2007 to establish a safe and confidential mechanism for public servants or members of the public to disclose wrongdoing in, or relating to, the federal public sector. Specifically, my Office has the mandate to investigate disclosures of alleged wrongdoing and complaints of reprisal brought forward under the *Public Servants Disclosure Protection Act* (the *Act*).

Section 8 of the *Public Servants Disclosure Protection Act*, S.C., 2005, c.46 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 findings of wrongdoing to the attention of the organization's chief executive and to make recommendations for corrective action.

Under subsection 38 (3.3) of the *Act*, I must report to Parliament founded cases of wrongdoing within sixty days after the conclusion of my investigation. This Case Report addresses one such investigation and the findings related to the disclosure of wrongdoing brought forward to my Office.

The Disclosure

On September 13, 2012, my Office received two separate disclosures in regard to the same allegations against the former President of the Canada School of the Public Service (the School), Mr. Guy McKenzie, and another employee at the School. The events giving rise to these disclosures arose in the course of an investigation into another unrelated disclosure of wrongdoing.

It was alleged that Mr. McKenzie, in his capacity as President, and the other employee had contravened subsection 8(1) of the *Privacy Act* and subsection 11(1) of the PSDPA by failing to protect the identity of persons involved in a disclosure process when an unredacted copy of an investigation notice letter from my Office was shared to all persons named in the letter.

The disclosers also reported that at least one employee of the School circulated or showed to several employees copies of letters from my Office that outlined the allegations and the names of the persons under investigation.

It was also alleged that by their actions, Mr. McKenzie and the other employee may have also committed a serious breach of the Values and Ethics Code for the Public Sector.

On November 29, 2012, after a careful review and detailed analysis of the information provided in the disclosures, my Office initiated an investigation that focused on possible contraventions of the *Privacy Act* and the PSDPA by Mr. McKenzie. My Office also investigated whether the School had put in place the required procedures to ensure the confidentiality of the disclosure process and to protect the identity of persons involved in disclosures.

My Office did not investigate the conduct of any other employee at the School in relation to these events, as the relevant provisions of the *Privacy Act* and the PSDPA did not impose any duty on them. Also, my Office did not investigate the allegations of a possible serious breach of a code of conduct as the information provided in the disclosures did not suggest that the subject-matter could meet the necessary threshold to constitute such a serious breach.

The Law

The Privacy Act

Subsection 8(1) of the *Privacy Act* states that personal information that is under the control of a government institution shall not be disclosed, without the consent of the individual to whom it relates, or as permitted under subsection 8(2) of the *Privacy Act*.

The Public Servant Disclosure Protection Act

Paragraph 11(1)(a) of the *PSDPA* requires that each chief executive protect the identity of persons involved in the disclosure process, including persons alleged to be responsible for wrongdoings.

Paragraph 11(1)(b) of the *PSDPA* requires each chief executive to establish procedures to ensure the confidentiality of information collected in relation to disclosures of wrongdoings.

Results of the Investigation

These are my findings based on the results of the investigation:

- **Mr. McKenzie contravened paragraph 11(1)(a) of the PSDPA by failing to protect the identity of persons involved in the disclosure process, thereby constituting a wrongdoing as defined under paragraph 8(a) of the PSDPA.**
- **No finding on the Privacy Act could be made because a complaint in regard to the same subject-matter had been made to the Office of the Privacy Commissioner of Canada (OPC) prior to the commencement of this investigation.**

Subsection 23(1) of the *PSDPA* provides that I may not deal with a disclosure or commence an investigation when a person or body acting another Act of Parliament is dealing with the same subject-matter. The findings of the OPC, and the School's admissions that it breached the *Privacy Act*, are accepted as established facts in this investigation and as such there was no need for my Office to make a separate finding under the *PSDPA* in this regard.

- **The allegation that the School failed to establish procedures to ensure the confidentiality of information collected in relation to disclosures and to protect the identity of persons involved in disclosures as required under the PSDPA was not substantiated.**

The results of the investigation show that the School had in fact established, after the coming into force of the *PSDPA* in 2007, sufficient procedures, although these were no longer current or in use at the time of the events giving rise to this investigation. Moreover, the *PSDPA* does not specify a timeline or provide standards for the chief executive to establish or update such procedures.

Overview of the Investigation

On August 30, 2012, Mr. McKenzie was informed by letter of an investigation to be conducted by my Office at the School pursuant to subsection 27(1) of the PSDPA. The letter, which was marked as Protected B, listed the allegations to be investigated and identified the individuals whose conduct was brought into question by the disclosures. The letter included a reference to my Office's obligation to conduct the investigation as confidentially as possible. When he received this letter, Mr. McKenzie directed his Chief of Staff and his Executive Assistant to hand-deliver an unredacted copy of the letter to each of the individuals named therein with his handwritten note on it asking for their cooperation in the investigation.

Those who received a copy of the letter from the President's office were surprised by its content which identified all of the individuals against whom allegations were made and who were to be investigated. In addition, shortly after receiving a copy of this letter, the disclosers learned through other employees that various copies of notices of investigation from my Office were being circulated amongst employees.

The School readily admitted that the distribution by Mr. McKenzie of the letter to each of the individuals named, without redacting personal information, was a breach of the *Privacy Act*.

When my Office's investigator first spoke to Mr. McKenzie, he was very contrite in taking responsibility for his actions, indicating that he failed to consider the *Privacy Act* and he stated not having been aware of all of his obligations under the PSDPA, adding that his "ignorance of the law is not a defence". It is worth noting that Mr. McKenzie is a trained jurist. The former President attributed his error to inadvertence.

Mr. McKenzie admitted that he had given a copy of the letter to all individuals named in order to inform them of the investigation and to urge their cooperation. He indicated having done so without realizing that this may have been in contravention of the *Privacy Act* and the PSDPA. Mr. McKenzie stated that he only realized his mistake when informed of this investigation. He indicated that he acted in good faith with no intention of causing harm to anyone.

When he received the letter, Mr. McKenzie did not seek any advice from this Office, his staff or the Department of Justice lawyers at the Treasury Board Secretariat on how to deal with a disclosure investigation. He stated that it was difficult not having departmental lawyers at the School. Mr. McKenzie added that this situation was rendered more complex by the fact that the School's designated senior officer for the disclosure of wrongdoing, who normally could have assisted him, could not act in this matter due to a conflict of interest. In addition, Mr. McKenzie observed that my letter did not expressly set out his confidentiality obligations.

The results of the investigation show that Mr. McKenzie did, in fact, take some measures to protect the identity of persons involved in the disclosure process; for example, he gave very

specific instructions to his Chief of Staff and Executive Assistant to treat the letter as confidentially as possible and that it be delivered in person only to the individuals concerned. In addition, he took measures to prevent the continued circulation among employees of other letters from my Office.

Nonetheless, I find that Mr. McKenzie failed to protect the identity of the persons involved in the disclosure process as required by paragraph 11(1)(a) of the PSDPA. However, there is no evidence to suggest that his actions were malicious or otherwise intended to cause harm to the individuals involved. I am satisfied that his intentions were to ensure full cooperation with my Office in the course of an investigation.

Procedures to Ensure Confidentiality

My Office also investigated whether Mr. McKenzie (and by extension the School's past and current Presidents) had established procedures to ensure the confidentiality of information collected in relation to disclosures and to protect the identity of persons involved in disclosures as required under the PSDPA.

I find that the School in fact did establish procedures to deal with disclosures and to ensure confidentiality, but these became outdated as a result of a re-organization at the school in late 2010. It is implied that a chief executive's obligations under the *Act* are on-going and procedures must be kept up to date. That being said, the *Act* does not specify a timeframe for the chief executive to establish procedures or in this case, ensure that they are updated and valid at all times. Accordingly, I cannot conclude that Mr. McKenzie or any of the School's past or current Presidents contravened the PSDPA by not updating their procedures.

The School's current President informed my Office that she has appointed a new senior officer under the *Act* and that the School is undertaking work on a priority basis to develop and communicate procedures for disclosure. She has undertaken to keep my Office abreast of progress.

Conclusion

Each of the individuals who received a copy of the unredacted letter had a reasonable expectation of privacy, both under the *Privacy Act* and the PSDPA. Clearly the information contained in an investigation notice issued under the *Act* is extremely sensitive. Confidentiality is a cornerstone of the PSDPA, meant to protect all persons involved in the disclosure process, including those against whom allegations are made. It is unfortunate that, in this case, personal information was shared inappropriately.

Although this was not the focus of the investigation, we also learned that individuals in receipt of other investigation notices from my Office may have shared or showed their letters to other employees. I want to remind everyone that public servants who make protected disclosures of wrongdoing and those who are involved in such disclosures must

act responsibly in protecting sensitive information. They must also follow established procedures or practices for the secure handling, storage, transportation and transmission of information that the Government of Canada or any portion of the public sector is taking measures to protect.

In accordance with paragraph 22(h) of the PSDPA, I have made recommendations to the current President of the School, concerning the measures to be taken to correct the wrongdoing. I am satisfied with the response to my recommendations and with the measures taken to date by the School to address the wrongdoing identified in this report. My recommendations and the School's response follow.

Recommendation and the School's response

I recommend that the School bring up to date, and establish as required, all necessary procedures required under sections 10 and 11 of the PSDPA to manage internal disclosures of wrongdoing made under the Act and to establish a process to deal with disclosures being investigated by my Office.

The School should emphasize the importance of respecting confidentiality when it establishes its new internal procedures.

The School accepts the Commissioner's recommendation and has already taken steps to address it.

Additional comments provided by the School

As indicated in the case report, the President recently appointed a new Senior Officer for the Disclosure of Wrongdoing. The new Senior Officer has updated the process for internal disclosures of wrongdoing and is leading a range of communications activities to ensure that all School employees have a good understanding of the process and the importance of respecting confidentiality.

Information on the disclosure of wrongdoing is now available on the School's Intranet site. It includes an overview of the PSDPA's objectives, a diagram of the School's disclosure process, a form for reporting wrongdoing, a summary of roles and responsibilities, and links to supplementary resources on the websites of the PSIC and Office of the Chief Human Resources Officer (OCHRO). The President included links to this new section of the Intranet in her September 2013 email to all employees announcing the appointment of the new Senior Officer.

The School's full executive team was briefed on the implementation of the PSDPA at the School in September 2013. Following the briefing, the President asked all executives to engage their team on this topic with a view to ensuring that employees understand the process for the disclosure of wrongdoing, the importance of respecting confidentiality, and where they can get

more information. Further supporting materials and information sessions are being planned.

If, in the future, the Senior Officer is unable to advise the President due to a conflict of interest, advice will be sought from an appropriate alternate, such as the ATIP Coordinator, the Values & Ethics Champion, the head of human resources, or the head of security.

Finally, School personnel who handle correspondence have been reminded of the proper procedures and protocols for sensitive material, with particular emphasis on protected and secret documents, and correspondence from the PSIC or similar officials.